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COME DOWN AND MAKE BARGAINS IN GOOD FAITH: THE APPLICATION OF 42 U.S.C. § 1981 TO RACE AND NATIONAL ORIGIN DISCRIMINATION IN RETAIL STORES

CHARLOTTE H. SANDERS*

Introduction

On a Saturday in July 2003, Samaad Bishop, an African American, bought a doll set for his daughter at a Toys “R” Us store in the Bronx, New York. As he was leaving the store, a security guard approached and asked to see his receipt. Mr. Bishop initially refused, asking why he had to show the receipt. The guard told him, “store policy,” and allegedly went on, “this is the Bronx, not the suburbs and black people steal more than whites.” Mr. Bishop and the guard began to argue, and the guard pushed him back into the store. During the argument, two white women exited the store carrying Toys “R” Us bags without being asked for their receipts. Mr. Bishop ultimately called the police and, when they arrived at the store, showed them his receipt. He was then allowed to leave.

Mr. Bishop later sued Toys “R” Us under 42 U.S.C. § 1981, which prohibits discrimination on the basis of race and national origin in contractual relationships.¹ He lost.² The court held that

* I thank the following people, all of whom have been instrumental in the production of this article: Professors Joseph William Singer and Elizabeth Warren, who offered invaluable feedback and guidance; the attorneys and staff of the Washington Lawyers’ Committee for Civil Rights & Urban Affairs, where I first became acquainted with 42 U.S.C. § 1981 and the strange lack of remedy for people discriminated against in retail stores; my family, who have provided unstinting support for all that I do; and James W. Alexander, Jr., who is my partner and my touchstone.

1. The statute reads:

(a) Statement of equal rights. All persons within the jurisdiction of the

once Mr. Bishop made his purchase, his contract with the store was complete, and he had no rights under the statute. Though Mr. Bishop made an adequate showing that the security guard had discriminated against him on the basis of his race, whatever harm he suffered fell outside § 1981's coverage.³

Theresa McCrea's § 1981 race discrimination claims against Saks, Inc. met a similar fate.⁴ On Saturday, April 18, 1998, Ms. McCrea, an African American, was shopping with her aunt and young daughter at a Saks clothing store in Philadelphia, Pennsylvania. A salesman approached her about her young daughter's behavior, and he and Ms. McCrea began to argue. The salesman then called security, telling them to "[g]et this nigger out." Ms. McCrea, her daughter, and her aunt left the store without purchasing the shirt they had planned to buy.

Ms. McCrea sued Saks, Inc. under 42 U.S.C. § 1981. Like Mr. Bishop, she lost. In granting the defendant's motion to dismiss, the court reasoned that the store did not infringe on any right protected by § 1981 because it did not outright refuse to sell the shirt to Ms. McCrea. Even though Ms. McCrea alleged that the salesman discriminated against her and her family on the basis of their race, they could not benefit from the statute's protection because they were merely "harassed and discouraged."⁵

United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (2006).

2. Bishop v. Toys "R" Us-NY LLC, 414 F. Supp. 2d 385, 388 (S.D.N.Y. 2006). Mr. Bishop also brought claims under state tort law, as well as under another portion of § 1981, the full and equal benefits clause. In addition, he asserted claims arising under 42 U.S.C. §§ 1982 and 1983. Though the court dismissed his § 1981 contract discrimination claim, Mr. Bishop's § 1981 full and equal benefits claim, § 1983 claim, and state law claims survived. The full and equal benefits clause of § 1981 is discussed further in Part IV.B.1, *infra*.

3. *Id.* at 393.

4. McCrea v. Saks, Inc., No. 00-1936, 2000 U.S. Dist. LEXIS 18990 (E.D. Pa. Dec. 2, 2000). Ms. McCrea also sued Saks under Title II of the Civil Rights Act of 1964 and state tort law. Like her § 1981 claim, the court dismissed both her Title II and state law claims.

5. *Id.*

In *Bishop* and *McCrea*, the plaintiffs were accused and harassed because they are African American. They were treated differently from the white customers around them. However, customers like Mr. Bishop and the McCrea family who have experienced discrimination because of their race or national origin in retail stores have few options for legal redress.⁶ The major federal public accommodations statute, Title II of the Civil Rights Act of 1964, does not cover retail stores.⁷ In addition, while some state public accommodations statutes explicitly ban discrimination in retail stores,⁸ no such statute exists in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Texas.⁹ In fact, Mississippi and South Carolina's laws codify a retailer's right to pick and choose among those who enter and receive service.¹⁰ As a

6. See Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 4 (2003). Professor Anne-Marie G. Harris describes these claims by shoppers as "Consumer Racial Profiling," defined as "any type of differential treatment of consumers in the marketplace based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer." She notes that "CRP can take many forms, ranging from overt or outright confrontation to very subtle differences in treatment, often manifested in forms of harassment. Outright confrontation includes verbal attacks, such as shouting racial epithets, and physical attacks, such as removing customers from the store. Customer harassment includes slow or rude service, required pre-payment, surveillance, searches of belongings, and neglect, such as refusing to serve African-American customers."

7. 42 U.S.C. § 2000a(b) (2006) (extending coverage only to any "establishment which provides lodging to transient guests," "facility principally engaged in selling food for consumption on the premises," "place of exhibition or entertainment," and other establishments within which a covered establishment is physically located or that is physically within a covered establishment).

8. See, e.g., 43 PA. CONS. STAT. § 954(l) (2005) ("The term 'public accommodation, resort or amusement' means any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to . . . retail stores and establishments . . ."); OHIO REV. CODE ANN. 4112.01(9) (2005) ("Place of public accommodation' means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.").

9. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1290 (1996). But see TEX. ALCO. BEV. CODE § 11.611 (2005) (allowing revocation of a liquor license from a retailer convicted of violating "an individual's civil rights or the discrimination against an individual on the basis of the individual's race, color, creed, or national origin.").

10. See S.C. CODE ANN. § 16-11-620 (2005) ("Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days."); MISS. CODE ANN. § 97-23-17(1)

result, many plaintiffs who have been discriminated against in retail stores have turned to the contracts clause of 42 U.S.C. § 1981.

Section 1981, a Reconstruction-era civil rights statute, guarantees to all people within the United States the same right "as is enjoyed by white citizens" to "make and enforce contracts." Over time, courts have changed the scope of § 1981, variously expanding and restricting the statute's coverage. In 1991, Congress amended the statute to extend its requirement of equality beyond the "making and enforcement" of contracts to include in subsection (b) the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." However, many courts have continued to apply the statute narrowly, despite the 1991 amendments that broadened its scope.

This narrowing has occurred in two ways. First, some courts have seemed simply to ignore the 1991 amendments, continuing to focus solely on § 1981's "make and enforce" clause. In this view, a shopper can state a claim under § 1981 only if he or she is clearly blocked from "making" a contract. Shoppers who successfully contract with retail stores, but on discriminatory terms and conditions, and browsers who are deterred, but not completely blocked from purchasing, can claim no § 1981 protection.

Second, even the courts that have made use of § 1981's "privileges, benefits, terms, and conditions" clause have narrowed the statute. These courts only accept as actionable those privileges, benefits, terms, and conditions that have a direct impact on the moment of purchase. Retailers' discriminatory acts against shoppers before or after the exchange of money for goods fall outside the statute, and those shoppers are left without a remedy.

This article examines and critiques courts' narrow interpretations of § 1981 and offers a model for improved § 1981 decisionmaking.¹¹ Part I of the article traces the history and

(2005) ("[A retailer] is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve.").

11. Other commentators have made similar observations about courts' application of § 1981 in retail store cases. The analysis in this article builds on their observations, but offers new critiques and proposes a new model for § 1981 decisionmaking. See Harris, *supra* note 6 (examining § 1981 through the lens of a particular retail store discrimination case); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001) (examining courts' narrow interpretations of § 1981); Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 307 (2001) (reviewing § 1981 as one of many possible ways to address "racial profiling" in retail stores); Abby Morrow Richardson,

amendment of § 1981. Part II surveys post-1991 §1981 retail store cases, focusing on the two ways in which courts have narrowed the statute's coverage. Part III explains and critiques judges' § 1981 decisions. Finally, Part IV explores directions for an improved application of § 1981 to claims of race and national origin discrimination in retail stores.

I. The History and Amendment of § 1981

A. The Origins of § 1981

In December 1865, disturbed by reports that Southern whites were recreating conditions of slavery for newly freed African Americans through acts of private discrimination, Senator Lyman Trumbull of Illinois introduced a bill to "grant to the Freedmen basic economic rights—to make and enforce contracts, to sue and be sued, and to purchase and lease property."¹² Congress passed the bill as the Civil Rights Act of 1866, pursuant to its power to enforce the Thirteenth Amendment's prohibition of slavery and involuntary servitude. The Act radically extended the Thirteenth Amendment's abolition of slavery into the realm of private economic relationships, in compelling whites to "come down and make bargains in good faith"¹³ and as equals with African-American freedmen. Indeed, in the view of one member of the Congress that passed the 1866 Act, the statute's reach into this previously protected world of private contractual relations was "absolutely revolutionary."¹⁴

The language of today's 42 U.S.C. § 1981 was originally part of Senator Trumbull's Civil Rights Act of 1866. At the time of its passage, the relevant section of the Act read:

Applying 42 U.S.C. 1981 to Claims of Consumer Discrimination, 39 U. MICH. J.L. REFORM 119 (2005); (focusing also on issues of consumer credit and patterns of shopping and consumption); Singer, *supra* note 9 (focusing on the property law implications of § 1981 when applied to retail stores; proposing changes to the common law to eliminate retailers' right to exclude).

12. Barry Sullivan, *Reconstructing Reconstruction: Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 550, 552 (1989).

13. *Id.* at 555 n.96 ("The old master was not inclined to treat them differently from what he did when they were slaves. . . . The old planters were very unwilling to come down and make bargains in good faith." (citing H.R. REP. NO. 30, 39th Cong. 1st Sess., pt. iv, at 116) (1866)).

14. Sullivan, *supra* note 12, at 547 n.38 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (Sen. Morrill)).

[C]itizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, *to make and enforce contracts*, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens¹⁵

In 1870, Congress reenacted this provision of the 1866 Act pursuant to the newly passed Fourteenth Amendment. Congress then split the provision into two sections within the Revised Statutes of 1874, which ultimately became today's 42 U.S.C. § 1981, concerning the right to contract, and 42 U.S.C. § 1982, concerning the right to purchase, hold, and sell real and personal property.¹⁶

Early cases applied the legislation's bar on race-based denials of contract and property rights to common carriers. In *Coger v. North Western Union Packet Co.*, 37 Iowa 145, 147-49 (1873), the Iowa Supreme Court held that the 1866 Act prohibited a steamboat from reserving a first class table for white passengers and excluding a female schoolteacher who was one quarter African American.¹⁷ Discussing the Act, the court commented, "The language is comprehensive and includes the right to property and *all rights growing out of contracts*. It includes within its broad terms every right arising in the affairs of life."¹⁸

Similarly, sixteen years later, in *Gray v. Cincinnati Southern R. Co.*, 11 F. 683 (Ohio, 1882), an Ohio court held that the "civil rights bill" guaranteed an African-American woman the right to a seat in the class of train car for which she had bought a ticket.¹⁹ The plaintiff had purchased a first class ticket, but was instead directed to the smoking car. The court analogized the situation to the denial of a seat to a male passenger, remarking, "The gentleman's money is just as good as the lady's, in the eye of the law, and they are bound to provide for him such reasonable accommodations as he has paid

15. Civil Rights Act of 1866, 14 STAT. 27 (1866) (current version at 42 U.S.C. § 1981 (2006)).

16. For the text of the 1874 versions of the statute, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 424 (1968).

17. *Coger v. North Western Union Packet Co.*, 37 Iowa 145, 147-49 (1873) (describing the plaintiff's identity as a "quadroon" and noting that "by her spirited resistance and her defiant words, as well as by her pertinacity in demanding the recognition of her rights and in vindicating them, she has exhibited evidence of the Anglo-Saxon blood that flows in her veins").

18. *Id.* at 156 (emphasis added).

19. *Gray v. Cincinnati S. R. Co.*, 11 F. 683 (Ohio, 1882).

and contracted for.”²⁰ With regard to the plaintiff herself, the court found that, “[w]hatever the social relations of life may be, before the law we all stand upon the broad plane of equality. And this company was bound to provide for this colored woman precisely such accommodations, in every respect, as were provided upon their train for white women.”²¹

There is also evidence, however, that the Civil Rights Act of 1866 was limited in its ability to reach far into the realm of private economic choice. After the *Civil Rights Cases*, 109 U.S. 3 (1883), invalidated a separate federal public accommodations law in 1883, courts’ interpretations of the Civil Rights Act of 1866 became correspondingly narrow.²² For example, in *Bowlin v. Lyon*, 67 Iowa 536 (1885), the Supreme Court of Iowa upheld the right of skating rink owners to refuse to sell a ticket to an African-American man on the basis of his race, despite advertisements that the rink was open to the public:

The act complained of by plaintiff was the withdrawal by defendants as to him of the offers which they had made to admit him, or to contract with him, for admission. They had the right to do this as to him, or any other members of the public. This right, as we have seen, is not based upon the fact that he belongs to a particular race, but arises from the consideration that neither he, nor any other person, could demand, as a right under the law, that the privilege of entering the place be accorded to him.²³

Though the plaintiff’s complaint focused on his right to make a contract, rather than his right to enter the skating rink as a place of public accommodation, the court imported the narrow reasoning of the *Civil Rights Cases* and dismissed the plaintiff’s contract-based claim.

Thus, while some early courts vigorously enforced § 1981’s guarantee of equal contract rights to African Americans, others refused to challenge the very private acts of discrimination that had

20. *Id.* at 686 (emphasis added).

21. *Id.*

22. *Civil Rights Cases*, 109 U.S. 3 (1883). In the *Civil Rights Cases*, a group of five consolidated cases that implicated the constitutionality of the public accommodations provisions of the Civil Rights Act of 1875, the United States Supreme Court struck down portions of the Act that prohibited discriminatory acts by individuals, rather than by state or federal government. In a decision that sharply constrained Congress’ power to address the problem of discrimination through federal legislation, the Court reasoned that neither the Thirteenth Amendment’s abolition of slavery nor the Fourteenth Amendment’s proscription of discrimination by the states authorized passage of a law that reached private acts of discrimination by non-governmental parties.

23. *Bowlin v. Lyon*, 67 Iowa 536, 540 (1885) (emphasis added).

troubled Senator Trumbull. Despite cases like *Bowlin*, § 1981 remained law, and continued to be a source of protection for many African Americans who had been discriminated against by common carriers and in public accommodations.²⁴ However, the question of the statute's revolutionary reach into what had previously been the shielded realm of private contractual relations has remained in dispute into modern times.

B. The Modern History of § 1981

The modern history of § 1981 can be traced to a 1968 Supreme Court decision, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). While early cases brought pursuant to Senator Trumbull's Civil Rights Act concerned race discrimination on common carriers and in places of public accommodation, in *Jones*, the Court faced the question of whether § 1982, § 1981's companion statute, barred "purely private discrimination" in a white owner's sale of a home to an African-American family.²⁵ The Court examined the twin histories of § 1981 and § 1982, noting Congress' fear in 1866 that private "custom or prejudice" might infringe on African Americans' property rights.²⁶ In a departure from its earlier, limited view of Congressional power in the *Civil Rights Cases*, the Court determined that § 1982's prohibition of race discrimination in the purchase and sale of real and personal property extended to private discriminatory acts. "We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress"²⁷

In 1974, the Court turned from § 1982 to the question of § 1981's application to private acts of discrimination. In *Runyon v. McCrary*, 427 U.S. 160 (1976), African-American families sued whites-only private schools under § 1981, and the schools argued that the statute did not apply to private actors.²⁸ The Court observed that the schools had advertised and offered their services to members of the general public, but then refused to serve white and nonwhite

24. See Singer, *supra* note 9, at 1378-82.

25. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 419 (1968) (emphasis added).

26. *Id.* at 423.

27. *Id.* at 413. See also *id.* at 413 n.5 ("Because we have concluded that the discrimination alleged in the petitioners' complaint violated a federal statute that Congress had the power to enact under the Thirteenth Amendment, we find it unnecessary to decide whether that discrimination also violated the Equal Protection Clause of the Fourteenth Amendment.").

28. *Runyon v. McCrary*, 427 U.S. 160 (1976).

students equally.²⁹ Citing *Jones*, the *Runyon* Court applied § 1981's contracts clause to the schools' discriminatory refusal to deal, stating:

The petitioning schools and school association argue principally that § 1981 does not reach private acts of racial discrimination. That view is wholly inconsistent with *Jones*' interpretation of the legislative history of § 1981 of the Civil Rights Act of 1866, an interpretation that was reaffirmed in [later Supreme Court cases] . . . And this consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct.³⁰

By 1974, therefore, the Supreme Court had interpreted both § 1982 and the contracts clause of § 1981 broadly, allowing the statute's protection to reach the "pervasive and entrenched private discrimination" that the 1866 Act was written to combat.³¹

C. *Patterson v. McLean Credit Union*

In 1989, the Supreme Court reversed course in its interpretation of § 1981 and § 1982. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), an African-American employee brought suit under § 1981, claiming that her employer had harassed her (including commenting that "blacks are known to work slower than whites"), failed to promote her, and then terminated her.³² Though the Court upheld *Runyon*'s broad application of § 1981 to private discriminatory acts, it adopted an extremely narrow view of the phases of the employment relationship covered by the statute. The Court stated:

The most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the "mak[ing] and enforce[ment]" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief. *Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.*³³

29. *Id.* at 164-65.

30. *Id.* at 173.

31. Sullivan, *supra* note 12, at 552.

32. *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 (1989).

33. *Id.* at 176 (emphasis added).

According to the Court, the harassment and discrimination that the plaintiff suffered fell outside § 1981's coverage because it took place after the initial formation of the employment contract. In reaching this conclusion, the Court first located a time period in which it determined "contract formation" to have occurred, and then drew a bright line between the "formation" and "postformation" phases of the employment relationship. Relying on this distinction, the Court held:

[T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment³⁴

Though he concurred with the majority in upholding *Runyon*, Justice Brennan dissented vigorously from its narrow reading of the statute. Joined by Justices Marshall and Blackmun and in part by Justice Stevens, Justice Brennan attacked the Court's formalism, accusing the majority of applying the statute in a manner "antithetical to Congress' vision of a society in which contractual opportunities are equal."³⁵ Rather than ending the § 1981 inquiry at the bright line marking the edge of "contract formation," Justice Brennan viewed discriminatory postformation conduct as evidence that the initial contract had been made on unequal terms.³⁶ As an example, he offered the scenario of an employer extending the same employment contract to African-American and white applicants, but telling the African-American applicant, "there's a lot of harassment going on in this workplace and you have to agree to that."³⁷ The *Patterson* plaintiff, he maintained, suffered the same harm as the fictional African-American applicant, and "in neither case can it be said that whites and blacks have had the same right to make an employment contract."³⁸

In a footnote, Justice Brennan offered a second way in which

34. *Id.* at 177.

35. *Id.* at 189 (Brennan, J., concurring in the judgment in part and dissenting in part).

36. *Id.* at 207 ("[T]he language of § 1981 is quite naturally read as extending to cover postformation conduct that demonstrates that the contract was not really made on equal terms at all.").

37. *Id.* at 208.

38. *Id.*

postformation discriminatory conduct would fall within § 1981's coverage. He recognized that postformation race discrimination against a contracting party might deter other members of that party's race from even beginning negotiations in the first place. He stated, "when a person is deterred, because of his race, from even entering negotiations, his equal opportunity to contract is denied as effectively as if he were discouraged by an offer of less favorable terms."³⁹

Justice Stevens also wrote separately, challenging the notion that an employment contract exists only at a single moment and is susceptible to clear demarcation at its borders. Noting that an at-will employee is "constantly remaking [his or her] contract," he argued that, "if, after the employment relationship is formed, the employer deliberately implements a policy of harassment of black employees, it has imposed a contractual term on them that is not the 'same' as the contractual provisions that 'are enjoyed by white citizens.'"⁴⁰ To Stevens, the majority's view of "contract" as a discrete event capable of being pinpointed at one moment in time ignored contracts' true identity as "evidence of a vital, ongoing relationship between human beings."⁴¹ However, despite the Brennan and Stevens opinions, the *Patterson* majority's narrow interpretation of the statute was binding, and § 1981 could be applied only to discrimination that took place at the discrete moment of contract formation.

D. The Civil Rights Act of 1991

Three years later, with the passage of the Civil Rights Act of 1991, Congress overruled *Patterson*, along with six other Supreme Court decisions that had interpreted civil rights laws narrowly.⁴² The Act amended § 1981 to broaden its coverage beyond the making and enforcement of contracts, specifically repudiating the *Patterson* majority's cramped reading of the statute. Comments from the legislative history of the 1991 Act reveal the sentiment that "[t]he

39. *Id.* at 209 n.13.

40. *Id.* at 221 (Stevens, J., concurring in the judgment in part and dissenting in part).

41. *Id.*

42. See Jane Rutherford, *The Myth of Due Process*, 72 B.U.L. REV. 1, 99 n.96 (1992) (noting that the Civil Rights Act of 1991 overturned six Supreme Court opinions in addition to *Patterson v. McLean Credit Union* and identifying the six cases as *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *Lorance v. American Telephone and Telegraph Technologies*, 490 U.S. 900 (1989), *Martin v. Wilks*, 490 U.S. 755 (1989), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *West Virginia University Hospital v. Casey*, 499 U.S. 83 (1991), and *E.E.O.C. v. Arabian American Oil*, 499 U.S. 244 (1991)).

Patterson decision [had] sharply cut back on the scope and effectiveness of section 1981... [with] profoundly negative consequences both in the employment context and elsewhere."⁴³ The report of the Senate Committee on Labor and Human Resources identified "a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination in contracts."⁴⁴ Congress therefore added subsection (b) to the statute, defining "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Congress also added subsection (c), which states, "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." This section codified *Runyon's* application of § 1981 to acts of private discrimination. Finally, though not explicitly mentioned in the amended statute, Congress approved of a Supreme Court decision, *St. Francis College v. Alkhazraji*, 481 U.S. 604 (1986), which applied § 1981 not only to race discrimination, but to discrimination on the basis of national origin as well.⁴⁵

Since the 1991 amendments, the plain language of § 1981 has provided far-reaching protection against private acts of race and national origin discrimination in contractual relationships. Yet despite Congress' broadening of the statute, many courts continue to apply it narrowly to claims of discrimination in retail stores, focusing only on the "make and enforce" clause or limiting the actionable privileges, benefits, terms, and conditions in subsection (b) to those that have a direct impact on the moment of purchase.⁴⁶

43. H.R. REP. NO. 102-40, pt. I, at 87, 89 (1991).

44. S. REP. NO. 101-315, at 12 (1990).

45. *St. Francis College v. Alkhazraji*, 481 U.S. 604 (1986); see also 137 CONG. REC. S15472, S15486 (daily ed. Oct. 30, 1991) (Statement of Rep. DeConcini) ("The Court in *St. Francis College* demonstrated that when Congress enacted this statute it intended to protect from discrimination a wide variety of groups that were then considered racial groups but are now considered national origin or ethnic minority groups. Characteristics that identify national origin groups are ethnic characteristics such as language, speech accent, culture, ancestry, birthplace, and certain physical characteristics.").

46. See, e.g., *Baltimore-Clark v. Kinko's, Inc.*, 270 F. Supp. 2d 695, 699 (D. Md. 2003) (internal citations omitted) ("Courts, including this one, that have examined discrimination in the retail context under § 1981 have focused on the question of whether a plaintiff's right to contract has been impeded, thwarted, or deterred in some way, . . . or whether special conditions have been placed on a plaintiff's right to contract.").

II. Courts' Double-Narrowing of § 1981

A. The Conception of Contract in Post-1991 § 1981 Retail Store Cases

Before examining the two ways in which courts after the 1991 amendments have narrowed § 1981, it is important to note the concept of contract that lies beneath those courts' restricted readings of the statute. The right to equal treatment that § 1981 confers is not free-standing, but is rather tied to an underlying contractual relationship. The Courts' view of that underlying contract influences their § 1981 jurisprudence. Though very few courts actually perform a contract law analysis in their § 1981 retail store decisions, one can imagine courts asking two preliminary questions at the outset of their § 1981 analyses: When is a retail contract made, and what is a retail contract for?

In response to the first question, a court could mark the beginning of the retail contractual relationship at multiple points. The relationship might be created by a shopper's entry into a retail store, signifying his or her "acceptance" of the store's "offer" of goods. Alternatively, the contractual relationship might begin when a customer locates the items for which he or she was looking, and end when he or she purchases those goods.

In § 1981 retail cases, however, courts have almost universally defined the contractual relationship between customer and retailer as both beginning and ending with the exchange of money for goods. Retail contracts come to resemble the *Patterson* majority's discrete, cabined employment contract, rather than Justice Stevens' "vital, ongoing relationship between human beings."⁴⁷ As the Fifth Circuit has stated, "A contract for employment involves a continuing contractual relationship that lasts for the duration of the agreement. . . . [I]n the retail context, by contrast, there is no continuing contractual relationship. Instead, the relationship is based on a single discrete transaction—the purchase of goods."⁴⁸ The contract is a moment, rather than a process, and the "making and enforcement" of a contract happen simultaneously at the point of purchase. As a result, when post-1991 courts limit § 1981's coverage to contracts' "making and enforcement," they also confine

47. *Patterson v. McClean Credit Union*, 491 U.S. 164, 221 (1989) (Stevens, J., concurring in the judgment in part and dissenting in part).

48. *Arguello v. Conoco, Inc.*, 330 F.3d 355, 360 (5th Cir. 2003).

its protections to the point of purchase, the moment when a customer exchanges money for goods and the contract is both made and enforced.

Courts have answered the second question—a retail contract’s content—by refusing to view the contract as a bargain for much more than the goods sold. In other types of § 1981 cases, such as claims brought against restaurants, courts have read the contract as encompassing services as well as goods.⁴⁹ In the retail store context, though some courts have recognized that § 1981’s subsection (b) requires equality in a retail contract’s privileges, benefits, terms, and conditions, this recognition has not translated into a consideration of many terms and conditions beyond the goods themselves. Instead, courts have generally accepted only those privileges, benefits, terms, and conditions that are tightly linked to the point of purchase, and have refused to examine services provided prior to or following that moment. Given the option to view services as well as goods as part of a retail contract, courts have adopted a limited view of the contracts’ content, confining the bargain to the goods exchanged for money.

The two ways in which courts have narrowed § 1981—focusing exclusively on the “make and enforce” clause and acknowledging only a few actionable privileges, benefits, terms, and conditions under subsection (b)—are thus based on a correspondingly limited view of the duration and content of the contract between customer and retailer. An examination of courts’ post-1991 § 1981 jurisprudence reveals both courts’ double-narrowing of the statute and the restricted view of retail contracts on which it is based.

B. The “Make and Enforce” Clause

Post-1991 courts’ first method of narrowing § 1981 in retail store cases has been to limit its coverage to only the “making and enforcement” of contracts, the core of § 1981 in its pre-1991 form. For these courts, a successful § 1981 claim involves the complete denial of a shopper’s right to “make” a contract in the form of a retailer’s outright refusal to deal. In retail settings, an outright refusal comes in several forms: a store barring a customer’s entry, asking a customer to leave, or refusing to complete a customer’s transaction at or near the checkout counter. In the pre-1991 *Patterson*-era, this type of claim represented the archetypal § 1981 retail store case, and courts easily identified violations of those

49. Cases challenging discrimination in restaurants under § 1981 are discussed further in Part III.B.2, *infra*.

customers' rights to "make and enforce" retail contracts.⁵⁰ Even after Congress' repudiation of *Patterson* in the Civil Rights Act of 1991, some courts have continued to limit the statute's coverage to cases involving outright refusals to deal. This narrowing of the statute is evident in courts' reasons for dismissing some § 1981 cases and for letting others stand, policing the boundaries of this "core" category of cases.

In *Arguello v. Conoco*, 330 F.3d 355 (5th Cir. 2003), Latino plaintiffs successfully purchased gas, but then abandoned their attempt to purchase beer when a clerk addressed them with racial epithets. In upholding the dismissal of their § 1981 claim, the Fifth Circuit identified a "rule" that, "where a customer has engaged in an actual attempt to contract that was thwarted by the merchant, courts have been willing to recognize a § 1981 claim."⁵¹ Because the plaintiffs bought gas and then "voluntarily" abandoned the beer purchase, they did not satisfy this "rule," as they failed to make the core showing of an outright refusal to contract.

Though the outcomes are different, courts have employed similar reasoning in allowing other claims to stand. In *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001), the Sixth Circuit allowed the plaintiff's § 1981 claim to proceed, but only because she was able to state a claim that fell within the court's limited view of the statute. The *Christian* plaintiff, an African American, was accused of shoplifting and asked to leave a store by police, requiring her to abandon a shopping cart full of merchandise. The Sixth Circuit concluded that the plaintiff "had selected merchandise to purchase, had the means to complete the transaction, and would, in fact, have completed her purchase had she not been asked to leave the store."⁵² The court remarked that the case "involve[d] none of the difficulties that other courts have encountered in determining whether there was a valid contract interest at stake."⁵³ The

50. See, e.g., *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990) (holding that an ejection of African Americans from a club and refusal to serve them was a case of outright refusal to contract in the form of a request to leave the premises); *Washington v. Duty Free Shoppers*, 710 F. Supp. 1288 (N.D. Cal. 1988) (denying motion to dismiss to a retailer who falsely told African-American plaintiffs that his store was closed or that they had to have an airline ticket to enter, despite no § 1981 analysis, and focusing instead on the question of whether the retailer's actions were discriminatory, thereby implicitly accepting the plaintiffs' claim of a core § 1981 violation in the store's blocking of their entry).

51. *Id.* at 358; see also *Morris v. Dillard's Dept. Stores, Inc.*, 277 F.3d 743, 752 (5th Cir. 2001) (requiring the plaintiff to show "evidence of some tangible attempt to contract with Dillard's during the course of the ban, which could give rise to a contractual duty between her and the merchant, and which was in some way thwarted").

52. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 874 (6th Cir. 2001).

53. *Id.* Courts have identified discrimination at the point of purchase, and therefore

plaintiff's claim fell within the core of § 1981's coverage because she could show the type of "thwarting" of her contract rights that the Fifth Circuit demanded in *Arguello*.

Post-1991 courts' treatment of § 1981 claims brought by browsers in retail stores further illustrates their reluctance to extend the statute's protections in the absence of an explicit refusal to deal. These courts have generally dismissed browsers' claims on the ground that they can show no intent to purchase, and therefore no core right to "make and enforce" a contract. For example, in *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996), the Seventh Circuit upheld the dismissal of claims by browsers discriminatorily accused of shoplifting because the plaintiffs "were neither denied admittance nor service, nor were they asked to leave the store."⁵⁴

The *Arguello* and *Office Max* plaintiffs' shopping experiences were surely modified when they endured racial epithets or were discriminatorily accused of shoplifting. However, the courts that rejected their claims disregarded the statute's expanded form,

have extended § 1981's coverage. See, e.g., *Burgin v. Toys-R-Us*, No. 97-CV-0998E, 1999 U.S. Dist. LEXIS 10073 (W.D.N.Y. June 30, 1999) (finding discrimination where store employees used racial epithets, returned plaintiffs' money they had already tendered, and removed them from the store); *Shen v. A&P Food Stores*, No. 93 CV 1184, 1995 U.S. Dist. LEXIS 21404 (E.D.N.Y. Dec. 7, 1995) (finding discrimination where plaintiffs alleged that a retailer refused to sell them groceries because they were Chinese American, shouting "Go back to China"); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 287 (5th Cir. 2004) (finding discrimination where an African American was refused service on his car and told, "Niggers always want something for nothing" and citing *Arguello* in characterizing the plaintiff's claim as a classic § 1981 violation, a situation in which "a merchant denies service or outright refuses to engage in business with a consumer attempting to contract with the merchant").

54. *Morris v. Office Max, Inc.*, 89 F.3d 411, 413-14 (7th Cir. 1996). Courts have also analyzed claims by browsers as if the plaintiffs were asserting an open-ended right to make future contracts, arguing that present discrimination by retailers has deterred them or others from entering into these future contracts. Though Justice Brennan suggested this very reading of § 1981 in *Patterson*, courts have not recognized such a right under § 1981, and have dismissed browsers' claims as falling outside the core coverage of the statute. See, e.g., *Turner v. Fashion Bug*, No. 99-3174, 1999 U.S. App. LEXIS 32576, at *6-7 (6th Cir. Dec. 9, 1999) ("[The plaintiff] had nothing in hand that he intended to purchase, and had nothing in particular in mind that he intended to buy. The fact that Turner may have made a purchase if he had found something he wanted to buy does not amount to a present intent to enter into a contract."); *Evans v. Harry's Hardware*, No. 01-1276, 2001 U.S. Dist. LEXIS 16606, at *5-6 (E.D. La. Oct. 5, 2001) ("[B]are allegations of a 'deterrence' from purchasing goods, 'constructive refusal' of service, or interference with a prospective contractual relation (without the allegation of an actual loss of a contractual interest) are speculative and insufficient to state a claim under § 1981."); *Sterling v. Kazmierczak*, 983 F. Supp. 1186, 1192 (N.D. Ill. 1997) (dismissing case because plaintiff had not located the air rifle cartridges he was looking for, he had not shown that he was actually going to contract with the store). But see *Ackerman v. Food-4-Less*, No. 98-CV-1011, 1998 U.S. Dist. LEXIS 8813 (E.D. Pa. June 10, 1998) (upholding a claim by a browser).

clinging instead to a pre-1991 view of the core and limits of the statute's coverage. In fact, the *Arguello* court explicitly rejected the plaintiffs' attempts to claim coverage under subsection (b),⁵⁵ characterizing the contractual relationship formed between customer and retailer as "based on a single discrete transaction—the purchase of goods" and holding subsection (b) inapplicable to a retail setting.⁵⁶

As illustrated by *Christian*, plaintiffs whose claims fall within the statute's core, who have experienced a retailer's outright refusal to deal and lost their right to "make and enforce" a contract, will be protected by § 1981. Yet many plaintiffs who cannot show a discriminatory outright refusal to contract have no opportunity for redress under the statute.

C. The "Privileges, Benefits, Terms, and Conditions" Clause

Though some courts have ignored subsection (b) and limited § 1981's reach to cases in which plaintiffs have been blocked from "making and enforcing" contracts, others have tentatively embraced the subsection and allowed claims in which a contract is formed, but with unequal privileges, benefits, terms, or conditions. Examples of these cases include those brought by customers who have been subjected to racial slurs at the point of purchase or who have been required to pre-pay or pay by certain methods. These customers all completed their purchases, and thus were not blocked from "making and enforcing" a retail contract. However, because the contractual moment was altered on the basis of race or national origin, courts have been willing to find violations of § 1981 under subsection (b). Though at first glance these courts seem to be widening the reach of § 1981 beyond cases such as *Arguello* and *Office Max*, their analyses in fact represent a second narrowing of the statute, because the terms, conditions, privileges, and benefits they have recognized are limited only to those discriminatory acts that have a direct impact on the contractual moment.

An example is *Williams v. Cloverleaf Farms Dairy Inc.*, 78 F. Supp. 2d 479 (D. Md. 1999), in which an African-American plaintiff attempted to make a purchase from a convenience store cashier.

55. Other plaintiffs may not have pled subsection (b), but courts would not be bound by this omission, as subsection (b), as written, is a *definition* of the term "make and enforce contracts" in subsection (a). Courts would therefore be free to draw on subsection (b) in their analyses, and would not be limited by plaintiffs' pleading.

56. *Arguello v. Conoco*, 330 F.3d 355, 359 (5th Cir. 2003).

That cashier made racial slurs and refused service.⁵⁷ After some delay, a second cashier completed the sale. The court held that the combination of the delay and the racial slurs constituted an alteration in the contract's terms and conditions sufficient to give rise to a § 1981 claim.⁵⁸

Similarly, in *Hill v. Shell Oil Co.*, 78 F. Supp. 2d 764 (N.D. Ill. 1999), African-American, but not white, customers were required to pre-pay for gasoline. In refusing to dismiss the plaintiffs' case, the court explicitly rejected the defendant's attempts to confine § 1981's protections to refusal-to-deal cases. Foreshadowing the Fifth Circuit's *Arguello* decision, the defendant argued that "because plaintiffs were admitted into the gas stations and ultimately were able to purchase gas, there has been no tangible deprivation of rights protected by § 1981"⁵⁹ The court disagreed and held that the discriminatory pre-payment requirement "adversely affected *the basic terms and conditions* of [the plaintiffs'] contract to purchase gasoline from Shell-brand stations."⁶⁰ Essential to the court's analysis was the timing of the discrimination "at the *point of sale*, directly implicating plaintiffs' right to contract and to enjoy 'all benefits, privileges, terms, and conditions of the contractual relationship.'"⁶¹ The court recognized a § 1981 violation in the imposition of discriminatory contractual terms and conditions. However, the court narrowed its analysis by tethering the terms and conditions claim to the concept that a retail contract exists only at one moment, the point of sale.

In *Buchanan v. Consolidated Stores Corp.*, 125 F. Supp. 2d 730 (D. Md. 2001), the court accepted as actionable similar discrimination at the point of sale. In that case, a chain of toy stores maintained a policy of refusing African-American customers' personal checks. The court held that, though the plaintiffs were ultimately successful in making purchases, the no-check policy violated § 1981's terms and conditions clause. Analogizing the case to *Hill v. Shell Oil Co.*, the court stated, "the defendants placed a special condition on Plaintiffs' right to contract . . . [f]urther, both sets of plaintiffs alleged that the respective defendants' discriminatory policies adversely affected *the*

57. *Williams v. Cloverleaf Farms Dairy, Inc.*, 78 F. Supp. 2d 479, 482-83 (D. Md. 1999).

58. *Id.* at 485 ("Although Williams was eventually able to purchase items from another cashier, the Court refuses to find that this delay in completing the transaction, coupled with the alleged racial attack, is insufficient as a matter of law to establish a violation of § 1981.").

59. *Hill v. Shell Oil Co.*, 78 F. Supp. 764, 777 (N.D. Ill. 1999).

60. *Id.* (emphasis added).

61. *Id.* (emphasis added).

basic terms and conditions of their contract to purchase merchandise.”⁶²

When discrimination occurs prior to or following the point of sale, however, many courts have refused to acknowledge a § 1981 subsection (b) claim. Trailing a customer through a store before completing a purchase would appear clearly to violate § 1981’s “terms and conditions” clause. This and similar forms of pre-purchase discrimination, however, do not occur at the *moment of purchase*, so courts have dismissed these claims.⁶³ Using similar reasoning, courts confronted with cases of post-purchase discrimination have also nearly uniformly declined to extend § 1981’s coverage, maintaining that the customer’s rights vis-à-vis the store end with the completion of the purchase.⁶⁴ Analytically, these

62. *Buchanan v. Consolidated Stores Corp.*, 125 F. Supp. 2d 730, 736 (D. Md. 2001) (emphasis added). *See also* *Buchanan v. Consol. Stores Corp.*, 217 F.R.D. 178 (D. Md. 2003) (granting summary judgment to the defendants on the ground that they had advanced a legitimate nondiscriminatory reason for their no-check policy and that the plaintiffs had failed to show that this reason was pretext).

63. *See, e.g., Jeffery v. Home Depot*, 90 F. Supp. 2d 1066, 1069 n.3 (S.D. Ca. 2000) (refusing to extend § 1981 protection to a plaintiff whose bag was searched prior to purchase; stating, “even if the search request was racially motivated, § 1981 would still not provide a statutory basis for a remedy in this case because Jeffery cannot prove interference with a contract right”). *Cf. Lewis v. Commerce Bank & Trust*, No. 03-4218, 2004 U.S. Dist. LEXIS 6477, at *6 (D. Kan. March 15, 2004) (dismissing claim of African-American plaintiff about whom a bank circulated a video of the plaintiff’s transaction and a memorandum describing him as a likely bank robber; “It is not alleged that racial profiling or racially motivated surveillance interfered with defendant’s ability to make and enforce contracts.”). *But see Allen v. U.S. Bancorp*, 264 F. Supp. 2d 945, 948 (D. Or. 2003) (holding a bank’s delay in check-cashing and requirement that an African-American customer remove his sunglasses to be an actionable contract term or condition under § 1981).

64. *See, e.g., Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir. 2001) (“[O]nce the purchase is completed, no contractual relationship remains.”); *Thomas v. Trotter*, No. 04-0672, 2006 U.S. Dist. LEXIS 292 (W.D. Mo. Jan. 6, 2006) (same); *Chu v. Gordmans, Inc.*, No. 01-182, 2002 U.S. Dist. LEXIS 26623 (D. Neb. Apr. 12, 2002) (same); *Rogers v. Elliott*, 135 F. Supp. 2d 1312, 1314-15 (N.D. Ga. 2001) (same); *Hickerson v. Macy’s Department Store at Esplanade Mall*, No. 98-3170, 1999 U.S. Dist. LEXIS 3244 (E.D. La. March 16, 1999) (same); *Thomas v. National Amusements, Inc.*, No. 98-71215, 1999 U.S. Dist. LEXIS 5188, at *8 (E.D. MI Feb. 24, 1999) (citing *Patterson* for the proposition that “conduct that occurs after the formation of a contract and which does not interfere with the right to enforce established contractual obligations” is not actionable under § 1981); *Ackaa v. Tommy Hilfiger*, No. 96-8262, 1998 U.S. Dist. LEXIS 3570, at *14 (E.D. Pa. March 24, 1998) (rejecting plaintiffs’ contention “that they were denied the right to enjoy all the terms, benefits and privileges of an implied contract between a retail establishment and its customers, i.e., to browse, examine and purchase merchandise without harassment, to leave the store without being subjected to accusations of theft, and to reenter the store at will for additional shopping, return or exchange of merchandise”); *Lewis v. J.C. Penney Company, Inc.*, 948 F. Supp. 367, 372 (D. Del. 1996) (“Lewis had done her shopping and was leaving the store; no contractual relationship remained.”); *Flowers v. TJX Cos.*, No. 91-CV-1339, 1994 U.S. Dist. LEXIS 10453 (N.D.N.Y. July 15, 1994) (same).

post-purchase cases are most analogous to the now-superseded reasoning of the *Patterson* majority, in which the Court rested its opinion on the idea that "the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established" ⁶⁵

Thus, though some courts have recognized privileges, benefits, terms, and conditions claims in addition to core refusal-to-deal claims under § 1981, each successful § 1981 claim in this category stems from a discriminatory privilege, benefit, term, or condition that is tightly linked to the *contractual moment*, the "point of sale," in the words of the *Hill v. Shell Oil Co.* court. Beneath these courts' analyses is the idea that a contract occurs at a discrete moment or "point" rather than Justice Stevens' "ongoing [contractual] relationship."⁶⁶ As a result, discrimination that occurs outside the bright lines of the contractual moment, prior to or following a purchase, is left without remedy under § 1981. The First Circuit has commented on this process of line-drawing, observing:

Of course, section 1981, like many laws, is more easily interpreted at the polar extremes. The statute applies, for example, if a store refuses, on race-based grounds, to permit a customer to purchase its wares. By the same token, it does not apply if no contractual relationship is ever contemplated by either party (say, if a store manager makes a racially insensitive comment to a fireman who responds to a false alarm). The harder cases occupy the middle ground: cases in which *a contract was made and the alleged discrimination bears some relation to it*. . . . [p]articularly after the passage of the 1991 amendment, such situations call for careful line-drawing, case by case.⁶⁷

65. *Patterson*, 491 U.S. at 177. Note, however, that in the cases of discrimination against browsers, some courts read the § 1981 claims of shoppers discriminated against after purchasing as asserting a right to a future contract, and held it not actionable. See, e.g., *Garrett v. Tandy Corp.*, 295 F.3d 94, 102 (1st Cir. 2002) ("[A] complaint must allege the actual loss of a contract interest, not simply the theoretical loss of a possible future opportunity to modify a contract."); *Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) ("A claim for interference with the right to make and enforce a contract must allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities."); *Holmes v. Dillard's Dept. Stores*, No. 99-3444, 2000 U.S. Dist. LEXIS 17263, at *2 (D. La. Nov. 17, 2000) ("There is no generalized right under section 1981 to have access to opportunities to make prospective contracts."). These courts do not follow Justice Brennan's suggestion in *Patterson*, and consider post-purchase discrimination evidence that the initial contract was made unequally. *Patterson*, 491 U.S. at 207-08 (Brennan, J., concurring in the judgment in part and dissenting in part).

66. *Patterson*, 491 U.S. at 221 (Stevens, J., concurring in the judgment in part and dissenting in part).

67. *Garrett*, 295 F.3d at 101 (emphasis added).

Courts that have twice-narrowed § 1981 have chosen to draw lines in the wrong places, creating areas of immunity for retailers in which race and national origin discrimination is permitted and protected. Part III of this article explains why judges might narrow § 1981, and then critiques post-1991 courts' § 1981 jurisprudence.

III. Explanation and Critique of Courts' § 1981 Jurisprudence

Judges who interpret § 1981 narrowly justify their decisions with a similar refrain: they fear that the amended statute, if unchecked, will be converted from a limited, contracts-based statute into a generalized anti-discrimination law that would regulate a wide variety of private behavior. This reluctance to expand § 1981 into the realm of the private was evident in *Patterson* itself, in which the Court supported its denial of the plaintiff's claim by pointing to the statute's limited scope when applied to acts of discrimination by private citizens:

The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere. Nevertheless, in the area of private discrimination, to which the ordinance of the Constitution does not directly extend, our role is limited to interpreting what Congress may do and has done.⁶⁸

Courts even after the 1991 overruling of *Patterson* have continued to echo these concerns.⁶⁹

68. *Patterson*, 491 U.S. at 188-89.

69. See *Lewis*, 948 F. Supp. at 371-72 (D. Del. 1996) ("Allowing plaintiff to proceed under such a theory would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts.") (emphasis added); *Arguello*, 330 F.3d at 358 ("[The statute] does not provide a general cause of action for race discrimination. Rather, it prohibits intentional race discrimination with respect to certain enumerated activities."); *Youngblood*, 266 F.3d at 855 ("Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred. The requirement remains that a plaintiff must point to some contractual relationship in order to bring a claim under Section 1981."). See also *Garrett*, 295 F.3d at 100 ("The legislative history of the 1991 amendment makes it crystal clear that Congress did not intend to convert section 1981 into a general prohibition against race discrimination."); *Baltimore-Clark*, 270 F. Supp. 2d at 700 (noting that, by expanding § 1981's coverage, "Congress did not intend to convert § 1981 into a general prohibition against race discrimination"). Even the broader interpretations of §

Courts' attention to the question of retaining limits on § 1981's coverage may be reasonable. However, courts have responded to a reasonable fear in an unreasonable way. In effect, courts interpreting § 1981 narrowly since 1991 have given shopkeepers an affirmative right to discriminate on the basis of race or national origin. The courts that have twice-narrowed § 1981 in retail store cases have been wrong as a matter of statutory interpretation and contract law. They have also been wrong as a matter of history, making decisions that are at odds with the development of property and contract law over time. The remainder of this Part critiques courts' § 1981 jurisprudence along these three axes.

A. Statutory Interpretation

First, as a matter of statutory interpretation, courts' narrow applications of § 1981 have ignored the 1991 amendments that broadened the statute's coverage. Judges' limited readings of the statute have also departed from the goals of the Congress that passed the 1991 Civil Rights Act, as evident in the Act's legislative history. Finally, the narrow view of § 1981 is contrary to the maxim of statutory interpretation that remedial statutes are to be read broadly.

As explained in Part I, prior to 1991, § 1981 guaranteed to all persons the same right as white citizens "to make and enforce contracts." In 1991, Congress added subsection (b) entitled "'make and enforce contracts' defined," which states, "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Though phrased merely as a definition of "make and enforce contracts," subsection (b) could in fact be read in multiple ways. The use of the word "includes" could indicate that the list of contractual activities enumerated in the clause is non-exhaustive. Alternatively, the fact that the 1991 amendments were a repudiation of the Supreme Court's *Patterson* decision could signal that subsection (b) was meant primarily to reach discrimination after contract formation, the focal point of the narrow *Patterson*

1981 advanced by this article would not convert the statute into a ban on race discrimination *in all contexts*. It would be impossible to argue, for example, that § 1981 prohibits a person on the street from addressing another passer-by with a racial epithet. The statute's coverage, even if interpreted to apply to pre-purchase, post-purchase, browser, and potential customer discrimination, would still hinge on the existence of some contractual relationship, albeit broadly defined.

decision. Finally, subsection (b)'s reference to a "contractual relationship" rather than just a "contract" could shift the statute's coverage to the entire interaction between contracting parties, rather than just the contents of the final bargain.⁷⁰

Yet even if a court does not accept any of these particular readings of subsection (b), the clause must have some function within the statute. At minimum, it should act as a signal to courts that the statute's coverage may not be read to end with the "make and enforce" clause of subsection (a). Given the presence of subsection (b), some courts' complete disregard for the fact that the statute was amended in 1991, even to the point of citing *Patterson*, appears quite strange.⁷¹

However, even the courts that have adopted a slightly broader view of the statute have appeared to ignore the expanded version of the text, or at least shy away from full engagement with subsection (b). Very few courts have recognized the potential difficulty in determining what does and does not fall within the contractual activities enumerated by the statute. As the First Circuit observed in *Garrett v. Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002),

The harder cases occupy the middle ground: cases in which a contract was made and the alleged discrimination bears some relation to it. . . . [p]articularly after the passage of the 1991 amendment, such situations call for careful line-drawing, case by case."⁷²

Courts' summary treatment of claims by browsers and shoppers discriminated against pre-purchase and post-purchase illustrates that few, if any, judges tackle the hard, case-by-case analysis necessary to determine whether a retailer's discrimination represents interference with a retail contract's "making,"

70. In *Garrett v. Tandy Corp.*, the First Circuit chose to read subsection (b) in this third way, extending the statute's protection beyond the contours of a specific contract:

The 1991 expansion of the definition of 'make and enforce contracts' in section 1981, then, extends the reach of the statute to situations beyond the four corners of a particular contract; the extension applies to those situations in which a merchant, acting out of racial animus, impedes a customer's ability to enter into, or enjoy the benefits of, a contractual relationship.

295 F.3d 94, 100 (1st Cir. 2002) (upholding the district court's dismissal of the plaintiff's claim, concluding that he had not shown discriminatory interference with any phase of his contractual relationship with the store.).

71. See Part II, *supra*; *Thomas v. National Amusements, Inc.*, No. 98-71215, 1999 U.S. Dist. LEXIS 5188, at *8 (E.D. MI Feb. 24, 1999) (citing *Patterson* for the proposition that "conduct that occurs after the formation of a contract and which does not interfere with the right to enforce established contractual obligations" is not actionable under § 1981).

72. *Garrett*, 295 F.3d at 101.

"performance," "modification," "termination," "benefits," "privileges," "terms," or "conditions." Instead, these courts have generally dismissed plaintiffs' claims, drawing the boundaries of the statute's protections very narrowly and tying its coverage to one, fleeting contractual moment.

In addition to ignoring the full text of the statute, the narrow decisions by these courts also contradict the goals of Congress in amending § 1981. The legislative history of the Civil Rights Act of 1991 shows that Congress was motivated by dissatisfaction with the Supreme Court's restricted *Patterson* decision and a desire to expand the reach of the statute beyond the moment of contract formation. In his discussion of the amended statute, Representative Henry Hyde of Illinois described § 1981's expanded scope. His reference to an African-American child's admittance to a private school could just as easily apply to retail stores:

As written, therefore, section 1981 provides insufficient protection against racial discrimination in the context of contracts. In particular, it provides no relief for discrimination in the performance of contracts (as contrasted with the making and enforcement of contracts). Section 1981, as amended by this Act, will provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example) or are dismissed or denied promotions because of race. In addition, the discriminatory infringement of contractual rights that do not involve employment will be made actionable under section 1981. *This will, for example, create a remedy for a black child who is admitted to a private school as required pursuant to section 1981, but is then subjected to discriminatory treatment in the performance of the contract once he or she is attending the school.*⁷³

Senator Orrin Hatch of Utah made similar observations about the newly broadened § 1981, noting:

[W]e have overturned the *Patterson* versus *McLean* case, to cover racial discrimination in terms and conditions of contracts under section 1981. All postcontract matters will now be covered by the racial provisions of section 1981, and that is a good step. President Bush has been willing to overturn *Patterson* versus *McLean* from the beginning, and so have all of us.⁷⁴

Section 1981 in the form described by Representative Hyde and

73. 137 CONG. REC. H9505, H9543 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) (emphasis added).

74. 137 CONG. REC. S15472, S15498 (daily ed. Oct. 30, 1991) (statement of Sen. Hatch).

Senator Hatch is therefore quite broad, and would seem to provide significant protection beyond the contractual moment.

In addition to Representative Hyde's and Senator Hatch's comments regarding the new statute's scope, other Senators and Representatives commented on its proper method of interpretation. An interpretive memorandum by the sponsors of the Senate bill, which also represented "the views of the [George H.W. Bush] administration," explained that the statute's new second clause expanding the definition of "make and enforce contracts," was "illustrative only, and should be given broad construction to allow a remedy for any act of intentional discrimination committed in the making or the performance of a contract."⁷⁵ According to the sponsors, the amended statute's enumeration of "making," "performance," "modification," "termination," "benefits," "privileges," "terms," and "conditions" should only be a starting point, a floor, rather than a ceiling. Given this legislative history, courts' narrow § 1981 decisions have strayed not only from the text of the amended statute, but also from the goals of the 1991 amendments.

Finally, judges' restricted applications of § 1981 fly in the face of the basic canon of statutory interpretation that remedial legislation is to be read broadly, to favor the legislation's beneficiaries. Though canons of statutory interpretation can certainly be challenged, those challenges do not justify courts' narrow interpretations of § 1981 in retail store cases.⁷⁶ Judge Richard Posner has outlined a major critique of the "broad interpretation" canon, arguing:

The idea behind this canon is that if the legislature is trying to remedy some ill, it would want the courts to construe the legislation to make it a more rather than a less effective remedy for that ill. This would be a sound working rule if every statute—at least every statute that could fairly be characterized as "remedial" (which I suppose is every regulatory statute that does not prescribe penal sanctions and so comes under another canon, which I discuss later)—were passed because a majority of the legislators wanted to stamp out some practice they considered to be an evil; presumably they would want the courts to construe the statute to advance that objective. But if, as is often true, the statute is a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective, a court that construed the statute broadly would upset the compromise that

75. *Id.* at S15483 (statement of Sen. Danforth).

76. See, e.g., Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950) (identifying conflicts among canons of statutory interpretation).

the statute was intended to embody.⁷⁷

Judge Posner's critique rests on two contingencies: that the statute *not* be truly remedial, and that the statute *not* be passed by a convincing majority of the legislators. As an initial matter, civil rights statutes, particularly those passed during Reconstruction, are quintessentially remedial. Justice Scalia has explicitly stated with regard to the Equal Protection Clause, the authority under which § 1981 was reenacted in 1870, that "broad interpretation [is] particularly important with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored."⁷⁸ Adding another remedial layer, Congress then amended § 1981 specifically to remedy the harm done by the Supreme Court's narrow *Patterson* decision. Congress also gave unmistakable support to the 1991 amendments: the Senate passed the Act with a vote of ninety-three to five, with two not voting, and the House passed it by a margin of 381 to 38 votes, with 13 members not voting.⁷⁹ Critiques such as Posner's, though perhaps applicable to other statutes, fall short when applied to § 1981. Though judges could comfortably employ this maxim of statutory interpretation in § 1981 retail store cases and extend the statute's coverage to many claims they now dismiss, many steadfastly refuse to do so.

B. Contract Law

Courts' narrow interpretations of § 1981 are also wrong as a matter of contract law. In assessing claims of discrimination in retail stores, courts have interpreted both the duration and the content of retail contracts quite narrowly. For the most part, they have viewed the contract as beginning and ending with the moment of exchange of money for goods. They have also seen retail contracts as bargains solely for the goods purchased. Though courts' § 1981 decisions seem motivated by this narrow view of contract, it is in fact extremely rare to find a § 1981 retail decision in which a judge has

77. Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808-09 (1983).

78. *Tennessee v. Lane*, 541 U.S. 509, 562 (2004) (Scalia, J., dissenting).

79. U.S. Senate Roll Call Votes 102nd Congress, 1st Session, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=102&session=1&vote=00238 (last visited April 17, 2007) and <http://thomas.loc.gov/cgi-bin/bdquery/z?d102:SN01745:@@R>. (last visited April 17, 2007). Notably, the House bill had 175 co-sponsors.

actually analyzed the contract at hand, with reference to principles of contract law. *Garrett v. Tandy Corp.* is the one exception, with the First Circuit acknowledging the need to turn to state contract law.⁸⁰ For the most part, though, judges have proceeded almost blindly through § 1981 analyses, making conclusory and unsupported decisions about a retail contract's duration and content.

In neglecting to analyze the contracts that lie under a § 1981 claim, since 1991 courts have followed, improperly, in the Supreme Court's footsteps. Professor Steven J. Burton criticizes *Patterson* on this ground, noting, "None of the nine Supreme Court justices . . . consulted contract law to interpret that statute, and counsel for neither of the parties used it in their advocacy."⁸¹ According to Burton, because "section 1981 does not establish an independent statutory right to make and enforce contracts," courts have no choice but to turn to "a right that exists elsewhere in the law—in particular, in the law of contracts."⁸² By failing to draw upon the body of contract law, both the *Patterson* Court and post-1991 courts have issued decisions in § 1981 retail store cases that are flawed, particularly in their treatment of a retail contract's duration and content.

1. Duration

Courts could define a retail contract's duration in several ways. First, a contract might be viewed not as a moment, but rather as a continuing interaction between the contracting parties. "Contract" becomes a verb, rather than a noun.⁸³ In this view, § 1981 does not protect the contents of a particular agreement frozen in time, but instead a customer's ability to exercise his or her *right to contract* over the course of his or her interaction with a retailer. The customer's movement through the store, evaluation of the merchandise, and consideration of the store's various guarantees and representations would all be components of the retail contract. The contract is formed gradually, as a product of the customer's exercise of his or her right to contract over time. Any interference

80. *Garrett v. Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002) ("Section 1981, insofar as it is pertinent here, pivots on contractual relationships, and the contours of what constitutes a 'contract' (or a 'contractual relationship,' for that matter) are properly found in state law."). One other § 1981 case has drawn on state contract law, but is inapposite here, as it involves state laws concerning the redemption of coupons. See *Hampton v. Dillard Dept. Stores*, 247 F.3d 1091 (10th Cir. 2001).

81. Steven J. Burton, *Racial Discrimination in Contract Performance: Patterson and a State Law Alternative*, 25 HARV. C.R.-C.L. L. REV. 431, 446 (1990).

82. *Id.*

83. Interview with Professor Joseph William Singer (December 2004).

with that right, whether before, during, or after a purchase is made, is then prohibited by § 1981.

In critiquing *Patterson*, Professor George H. Taylor argues that this view of a right to contract, exercised over the course of a relationship, is in fact mandated by the law of contracts:

If the Court had been more attentive to the insights of contract law, it would have realized that contract law denies that the moment of contract formation is decisive. The Uniform Commercial Code, for example, acknowledges the potential need to define contract formation where "the moment of its making is undetermined." As the secondary commentaries have suggested, the Code recognizes the possibility of circumstances contrary to the orthodox catechism that there is a definite moment in time when a party becomes contractually bound on a promise.⁸⁴

Burton makes a similar point, describing the contract right as "a single integrated legal power" and noting that, "[f]ar from isolating formation, performance, and enforcement from each other, the modern law of contracts treats the stages of contract as interdependent and mutually supporting parts of a coherent social practice."⁸⁵ Here, Burton's argument echoes the characterization of contract as "evidence of a vital, ongoing relationship between human beings" from Justice Stevens' *Patterson* opinion.⁸⁶

Though Burton was writing in 1990, when § 1981 covered only contracts' making and enforcement, his insights hold true today when applied to the broadened statute. If all customers possess an integrated, continuing right to contract, and the "moment of contract formation" is indeterminate, courts can then view the interaction between a retailer and those who enter his or her store as occurring on a continuum. Browsers could not be excluded from § 1981's protections, as a browser's movement through the store and contemplation of the store's goods and prices would represent an exercise of his or her right to contract. In addition, customers who have already made purchases become browsers or potential customers once again, or are parties to a continuing contractual relationship with a retailer, able to "enforce" or "perform" their contract with regard to the goods purchased. Contracts in retail stores loop back on themselves, and those who enter are at every

84. George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259, 275 (1995). See also U.C.C. § 2-204(2) ("An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.").

85. Burton, *supra* note 81, at 445.

86. *Patterson v. McClean Credit Union*, 491 U.S. 164, 221 (1989) (Stevens, J., concurring in the judgment in part and dissenting in part)

point exercising in some manner an integrated "right to contract."

A scenario suggested by Professor Elizabeth Warren illustrates this view of a retail contract's duration.⁸⁷ From the time a potential customer enters a retail store, he or she begins to exercise the right to contract, and the terms of the contract between the customer and retailer form over time. If browsers and potential customers are not allowed to walk freely through a store, ask questions, examine the goods available, compare prices, and consider stores' representations of the quality of the goods, they miss critical steps in the contracting process. For example, a banner hanging in a store advertising a money-back guarantee or a sign describing the goods sold as "100 % cotton" would become part of the contract between store and customer. If a customer is discriminatorily pulled into a back room on suspicion of shoplifting or ejected from a store prior to making a purchase, he or she is not allowed to read the banner or consider the sign, and has not been able to exercise equally his or her right to contract. This view of "contract" as a verb rather than a noun, as a process rather than a moment, stays true to the contract law underpinnings of § 1981 and gives full force to Congress' broadening of the statute in 1991. However, courts have not adopted this view, and instead issue opinions that rely on the misguided idea that a retail contract begins and ends at a single moment.

A second possible view of a retail contract's duration draws more explicitly on present-day state contract law, and contemplates a series of contracts' being made and re-made throughout a customer's time in a store. In *Garrett v. Tandy Corp.*, the First Circuit stated that, "[s]hopping in a retail store may involve multiple contracts. Each time a customer takes an item off the shelf, a new contract looms, and each time the item is returned, the potential contract is extinguished."⁸⁸ Though in the end the *Garrett* court upheld the lower court's dismissal of the plaintiff's claim, its decision is notable in its engagement with the law of contracts.

Because no state law definition of a retail contract existed in Maine, where *Garrett* arose, the court drew on state contract cases from Maryland, Georgia, and Oklahoma to develop this fluid interpretation of retail contracts. These three cases concerned a retailer's responsibility for pre-purchase injuries suffered by customers from exploding soda bottles. In order to determine the retailers' liability, the courts had to determine first whether the customer had entered into a contract with the store at the time of the explosion. Unlike the courts interpreting § 1981 in retail store cases,

87. Interview with Harvard Law School Professor Elizabeth Warren (June 5, 2005).

88. *Garrett*, 295 F.3d at 100.

the Maryland, Georgia, and Oklahoma Supreme Courts uniformly distinguished between a retail *contract* and a retail *sale*. In these courts' analyses,

[T]he retailer's act of placing the bottles upon the shelf with the price stamped upon the six-pack in which they were contained manifested an intent to offer them for sale, the terms of the offer being that it would pass title to the goods when [the customer] presented them at the check-out counter and paid the stated price in cash. We also think that the evidence is sufficient to show that [the customer's] act of taking physical possession of the goods with the intent to purchase them manifested an intent to accept the offer and a promise to take them to the check-out counter and pay for them there.⁸⁹

The Georgia Supreme Court explained further that a customer could manifest his or her "acceptance" in one of three ways:

(1) by delivering the goods to the check-out counter and paying for them; (2) by the promise to pay for the goods as evidenced by their physical delivery to the check-out counter; and (3) by the promise to deliver the goods to the check-out counter and to pay for them there as evidenced by taking physical possession of the goods by their removal from the shelf.⁹⁰

By stocking the shelves, a store makes an offer, or a promise, to sell. By picking up the item, the customer accepts, and makes a return promise to pay. The contract is made at that point, and the sale, a separate transaction, is completed at the checkout counter.

Only one § 1981 retail store court has come close to viewing the interaction between a customer and a retail store in this manner. In *Ackerman v. Food-4-Less*, No. 98-CV-1011, 1998 U.S. Dist. LEXIS 8813 (E.D. Pa. June 10, 1998), the court stated:

The purpose of going to a grocery store is to buy groceries. The purpose of picking an item off the shelf at a grocery store is so one may buy it. We feel that it is a very reasonable inference that Plaintiff picked up the Spanish spice powder so that she could purchase the seasoning.⁹¹

89. *Giant Food, Inc. v. Wash. Coca-Cola Bottling Co.*, 273 Md. 592, 605 (1975).

90. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 33-34 (1976); *see also* *Barker v. Allied Supermarket*, 596 P.2d 870, 871 (1979) ("The issue here is whether a buyer of goods who is invited by a merchant to take possession thereof from a self-service display and to defer payment to sometime subsequent to the taking of possession, has the protection of an implied warranty of merchantability. We hold he does.").

91. *Ackerman v. Food-4-Less*, No. 98-CV-1011, 1998 U.S. Dist. LEXIS 8813, at *8-9

The court seemed to view the plaintiff's "taking physical possession of the goods by their removal from the shelf"⁹² as an acceptance of the store's offer. Nevertheless, later in the decision, the *Ackerman* court reverted to an idea of the contract and the sale as being identical and existing only at the moment of purchase, stating that if the plaintiff had been able to *purchase* groceries, a *contract* would have been made.⁹³ This collapsing of contract and sale into a single contractual moment is the typical approach by courts in § 1981 retail store cases, despite state contract law to the contrary.

This state-law based interpretation would save the claims of shoppers who experience pre-purchase discrimination. Because the *contract* is made when a customer chooses an item from a shelf, this view of contract formation would also preserve the claims of customers who consider purchasing but do not complete a sale. However, as in *Garrett* itself, claims of post-purchase discrimination would still remain outside the coverage of § 1981. Taylor notes this problem:

In the example favored by treatise writers, where a customer is injured by a bottle that explodes after the customer has taken it off the grocery store shelf, a contract between store and customer had already been formed at the time of injury—the merchant had made an offer through the stocking of the goods, and the customer had accepted the offer through the performance of taking the item from the shelf. Under this logic, where a cashier [engages in discrimination after the purchase], this occurs subsequent to the formation of a contract and so does not present a viable section 1981 claim.⁹⁴

Claims of browsers, who possess no intent to purchase and therefore might not pick up items from shelves, are left out of this formulation of retail contract as well. Therefore, this view of contract therefore falls short. In order to bring such claims within the ambit of § 1981, courts would need to shift their focus from the contractual *moment* to the contractual *process*, and begin reading § 1981 as Justice Stevens did in *Patterson*.

A final proposal for defining a retail contract's duration has its roots in Blackstone's writings on the obligations of innkeepers and common carriers to the public. In this view, a retail store makes an "offer" of its goods by opening itself to the public. The customer

(E.D. Pa. June 10, 1998).

92. *Fender*, 138 Ga. App. at 33-34.

93. *Ackerman*, 1998 U.S. Dist. LEXIS 8813, at *9 (emphasis added).

94. Taylor, *supra* note 84, at 272.

then "accepts" by making a purchase. Professor Joseph William Singer relates that, in his 1765 Commentaries on the Laws of England, Sir William Blackstone identified as an "offer" an innkeeper's, common carrier's, "or other victualler[s]" hanging of a sign advertising his services.⁹⁵ When a customer "steps inside" and "tenders the usual fare," he or she accepts the offer, and the contract is made.⁹⁶ Wesley Hohfeld agreed with this formulation, noting that the only way an offeror of public accommodation could rescind his or her offer would be to go out of business.⁹⁷ More recently, Professor Stephen E. Haydon has proposed that "any business that extends a general offer of the sale of goods or services arguably has made an offer to contract, and anyone denied the opportunity to contract because of his or her race may invoke section 1981."⁹⁸

In the retail store context, the store's sign would represent the retailer's offer, and a customer's payment at the checkout counter would represent "tendering the usual fare." The contract would then be complete. If post-1991 courts were to adopt this view of a retail contract's duration, many § 1981 retail store claims that courts currently dismiss would survive. Any pre-purchase discrimination by a retailer between the time a customer enters a store and arrives at the checkout counter would represent a violation of § 1981, likely a core infringement on the customer's ability to "make" a contract. Discrimination against browsers, as well as post-purchase discrimination, however, might still stand on shaky ground.

Yet despite the historical roots of this concept of a retail contract's duration, it is almost certainly wrong. As Singer notes, it is unlikely that the mere fact that a retail store is open for business could constitute a specific offer to an individual shopper.⁹⁹ In addition, the modern § 1981 plaintiffs who have attempted to characterize a retail contract's duration in this way have failed. In *Lewis v. J.C. Penney*, 948 F. Supp. 367 (D. Del. 1996), the plaintiff

95. Singer, *supra* note 9, at 1309.

96. *Id.* at 1309-10 ("When the carrier holds itself out as open to serve the public, it presents an offer that is accepted the moment a passenger tenders the usual fare, and the contract is breached if the carrier refuses to serve the passenger.").

97. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 52 (1913) ("It would therefore seem that the innkeeper is, to some extent, like one who had given an option to every traveling member of the public. He differs, as regards net legal effect, only because he can extinguish his present liabilities and the correlative powers of the traveling members of the public by going out of business.").

98. Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1223 (1997).

99. Singer, *supra* note 9, at 1346 ("[O]pening up an inn to the public would not be considered a promise to serve particular individuals that is sufficiently definite so as to constitute a legally-binding obligation.").

"claimed the existence of an unstated, unwritten contract between commercial establishments and the public, that all who enter premises of the former will be treated equally regardless of race."¹⁰⁰ In rejecting what it characterized as a "nebulous contract theory," the court stated that, "Allowing plaintiff to proceed under such a theory would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts."¹⁰¹ Likewise, in *Ackaa v. Tommy Hilfiger*, No. 96-8262, 1998 U.S. Dist. LEXIS 3570 (E.D. Pa. March 24, 1998), the court rejected the plaintiff's argument for a "presumed right to be free of race discrimination while accepting a store's invitation to shop."¹⁰² Building on decisions like *Lewis* and *Ackaa*, Professor Deseriee A. Kennedy summarizes courts' approach:

Most courts do not recognize as viable claims of black plaintiffs to the same right to shop as whites. Consumers who allege discriminatory treatment in the form of being followed or subjected to heightened surveillance, without more, frequently fail to articulate a viable cause of action under Section 1981.¹⁰³

Thus, like the rolling contracts in *Garrett*, the Blackstonian idea of a store's general offer to the public, accepted by a customer's tender of money, is also inadequate.¹⁰⁴ For § 1981 to provide the protection its drafters in 1866 and its revisers in 1991 intended, courts should alter their vision of a retail contract's duration and accept the idea of a contract as a process, rather than a moment.

2. Content

In addition to their missteps in defining the duration of a retail

100. *Lewis v. J.C. Penney*, 948 F. Supp. 367, 371 (D. Del. 1996).

101. *Id.*

102. *Ackaa v. Tommy Hilfiger*, No. 96-8262, 1998 U.S. Dist. LEXIS 3570, at *14 (E.D. Pa. Mar. 24, 1998) (emphasis added).

103. Kennedy, *supra* note 11, at 306-07.

104. If, however, a retail store were to go beyond merely hanging a sign, and also advertise its products and their prices through the mail or by other means, the store might be deemed to be inviting offers by customers. Though not an offer itself, such an invitation could be seen as the beginning of a relationship between customer and retailer that culminates in the formation of a contract. Because the store's invitation to the customer starts the contracting process and is necessary for the contract's eventual formation, a retailer's discrimination against a customer responding to a store's advertisement would then violate § 1981. See WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 27 (3rd ed. 1957) ("[I]f goods are advertised for sale at a certain price . . . such an advertisement is a mere invitation to enter into a bargain rather than an offer.").

contract, courts have been wrong in limiting the bargain between a customer and a store to the goods purchased. In his *Patterson* opinion, Justice Brennan highlighted the absurdity of the majority's decision to restrict the content of an employment contract to only the offer and acceptance of the job.¹⁰⁵ Analogizing the *Patterson* plaintiff's situation to one in which an employer informs an African-American applicant that she is hired, but will have to suffer racial harassment on the job, Justice Brennan stated,

I see no relevant distinction between that case and one in which the employer's different contractual expectations are unspoken, but become clear during the course of employment as the black employee is subjected to substantially harsher conditions than her white co-workers.¹⁰⁶

The retail store analog to Justice Brennan's hypothetical job offer is a circumstance in which a retailer states to customers, "you can make purchases in my store, but if you are African American, Latino, or Asian American, you will have to suffer racial harassment in order to do so." Like the *Patterson* majority, the post-1991 courts that have applied § 1981 narrowly would likely dismiss the claim of a customer presented with such a statement. Except in cases like *Williams v. Cloverleaf Farms Dairy* and others described in Part II.C, in which the harassment or discrimination occurs at the very point of purchase, courts have focused only on the goods sold, and excluded from the contract, and therefore also from the statute's coverage, the quality of the service provided.

An alternative view of the content of retail contracts, closer to that of Justice Brennan in *Patterson*, would include services as well as goods as part of the bargain between a store and a customer. Indeed, one could argue that, because it is nearly impossible to make a purchase without interacting with some store personnel,¹⁰⁷ the quality of the service provided by that personnel must then be part of the customer's contract with the store. As Kennedy observes, "It is artificial to separate out those acts inimical to shopping from the exchange of tender for goods at the cash register."¹⁰⁸

In contexts other than retail stores, courts have been willing to

105. *Patterson*, 491 U.S. at 208 (Brennan, J., concurring in the judgment in part and dissenting in part).

106. *Id.*

107. The advent of self-service checkout lanes in supermarkets, for example, might present a situation in which a customer could shop without interacting with another human being.

108. Kennedy, *supra* note 11, at 322.

recognize services, as well as goods, as part of the bargain between seller and purchaser. Professor Anne-Marie Harris argues that "there is precedent for the proposition that § 1981 proscribes race-based harassment . . . when such conduct degrades—but does not completely deny—goods or services for customers of color."¹⁰⁹ Courts' willingness to consider service as part of the contract between buyer and seller is most clear in § 1981 claims brought by plaintiffs discriminated against in restaurants. Though courts have not been entirely uniform in their treatment of § 1981 restaurant claims, many have held unequivocally that a customer contracts with a restaurant not only for the food purchased, but also for the service provided.¹¹⁰

In *Charity v. Denny's, Inc.*, No. 98-0554, 1999 U.S. Dist. LEXIS 11462 (D. La. July 27, 1999), African-American plaintiffs were harassed by a waiter, who stated, "[m]anagement can't force me to serve niggers."¹¹¹ The court refused to dismiss the plaintiffs' claim, despite the fact that they were successfully able to purchase food, and had thereby made a contract with the restaurant. The court held that "[d]ining in a restaurant includes being served in an atmosphere which a reasonable person would expect in the chosen place. Courts have recognized that the contract formed between a restaurant and a customer does include more than just the food ordered."¹¹² Similarly, in *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043 (D. Ill. 1998), the African-American plaintiffs ordered pizza to eat inside the restaurant.¹¹³ The restaurant personnel refused to give them plates, napkins, and utensils, and told them to eat out of the pizza boxes. The defendant argued that the plaintiffs had no § 1981 claim because "they were not denied the right to contract in that they were provided their pizza and permitted to eat

109. Harris, *supra* note 6, at 47.

110. Interestingly, there is a dispute among courts in § 1981 restaurant cases over the proper prima facie case. Some courts require that a plaintiff make an initial showing that he or she was denied a contract right that remained available to similarly situated white customers. See, e.g., *Givens v. Waffle House, Inc.*, No. 03-3367, 2006 U.S. Dist. LEXIS 5204, at *17 (N.D. Ga. Jan. 25, 2006). Other courts reject this prong of the prima facie case, noting that, in the transitory context of a restaurant, a plaintiff may not be able to identify a white comparator. These courts require simply that a § 1981 plaintiff show that he or she received service in a "markedly hostile manner" that a reasonable person would find "objectively discriminatory." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001). For further discussion of pleading requirements in § 1981 retail store cases, see Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159 (2001).

111. *Charity v. Denny's, Inc.*, No. 98-0554, 1999 U.S. Dist. LEXIS 11462, at *4 (D. La. July 27, 1999).

112. *Id.* at *11-12.

113. *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043, 1046 (D. Ill., 1998)

it at the restaurant."¹¹⁴ The court, however, held that the restaurant had failed to provide the plaintiffs with the "full value of their purchase" by denying them "the accoutrements that are ordinarily provided with a restaurant meal at the Godfrey Pizza Hut."¹¹⁵ Finally, in *Perry v. Burger King Corp.*, 924 F. Supp. 548 (S.D.N.Y. 1996), the court refused to dismiss the § 1981 claim of an African-American plaintiff who was denied access to the restaurant bathroom after he had purchased, and eaten, his food.¹¹⁶ The court held that the "plaintiff has stated a claim under § 1981, *particularly if Perry is considered to have contracted for food and use of the bathroom.*"¹¹⁷

In each of these cases, courts have defined the contract between customer and restaurant as encompassing more than the food sold. They have recognized the service provided by restaurant staff, "atmosphere," "accoutrements," and use of the bathroom as contractual terms protected by § 1981. Notably, courts accepted these additional contractual terms even though Denny's, Pizza Hut, and Burger King are all fast food, low-cost establishments, not known for their "atmosphere" or high-end service. There is no principled reason why service should not also be considered part of the contract between a customer and a retail store. Many of the claims cited in Parts II and III arose out of acts of discrimination in clothing stores, where customers must often consult with salespeople in order to try on clothes. Even in supermarkets and convenience stores, customers must often ask for assistance in locating items on the shelves. In addition, retail store customers, just like restaurant patrons, often need to use the bathroom. Finally, a retail store's "atmosphere" certainly affects a customer's decision to spend his or her money there or elsewhere. Just as a customer's movement through a store, asking of questions, comparison of prices, and evaluation of the quality of goods might be relevant to a contract's *duration*, these services might also be considered additional parts of a contract's *content*. Courts' continued insistence on excluding services from their consideration of retail contracts, except in situations where discriminatory service is tightly tethered to the contractual moment, therefore appears without foundation.¹¹⁸

114. *Id.* at 1047.

115. *Id.* at 1048.

116. *Perry v. Burger King Corp.*, 924 F. Supp. 548, 552 (S.D.N.Y., 1996)

117. *Id.* (emphasis added).

118. See *Leach v. Heyman*, 233 F. Supp. 2d 906 (D. Ohio 2002) ("Though she only called plaintiff a name that any African-American would find deeply offensive after he had completed his purchases and was about to exit, that she did so at all is clear and direct proof of bias. It also indicates that the 'service' she provided was less than that which she might have provided, had plaintiff been Caucasian.").

In *Leach*, as in Justice Brennan's *Patterson* opinion, quality of service functions not

C. Historical Development of Property and Contract Law

Finally, courts' narrow § 1981 decisions are out of step with the historical development of property and contract law. Courts have expressed great reluctance to transform § 1981 into "a general cause of action for race discrimination in all contexts."¹¹⁹ As a result, they restrict § 1981's coverage to "core" claims—a retailer's outright refusal to deal or imposition of discriminatory terms and conditions at the moment of purchase—and leave plaintiffs with claims of browser, pre-purchase or post-purchase discrimination with no remedy. In essence, these courts' narrow applications of the statute produce only two "rules" that retailers must follow: allow all customers equal entry and take all customers' money on equal terms at the checkout counter. However, seen in their historical context, these two "rules" are themselves radical, contrary to traditional notions of private property and freedom of contract. That courts now enforce § 1981's two radical "rules" without protest, requiring equal access and equal right to purchase, but then balk at requiring equal treatment of browsers and customers both before and after their purchases, seems quite odd.

Historically, the right to exclude was seen as "the most central right associated with property."¹²⁰ In 1885, the Supreme Court in *Bowlin v. Lyon*, 67 Iowa 536 (1885), expressed a concern that § 1981 might be interpreted to make inroads on a retailer's right to deny entry to any member of the public.¹²¹ Addressing the question of an African-American ticket holder's right of access to a skating rink, the *Bowlin* Court rejected any reading of the statute contrary to the rule that "neither [the plaintiff], nor any other person, could demand, as a right under the law, that the privilege of entering the place be accorded to him."¹²² However, just as the *Bowlin* court feared, courts today apply § 1981 to eliminate the retailer's right to exclude.

as part of a contract's content, but rather as a signal about the nature of the contract that was formed earlier, at the time of purchase. Notably, though the *Leach* court read § 1981 more expansively than many other courts, even this reading relied on a "contractual moment" view of contract, the nature of which judges investigate by observing post-purchase behavior.

119. *Lewis v. J.C. Penney Company, Inc.*, 948 F. Supp. 367, 372-73 (D. Del. 1996).

120. Singer, *supra* note 9, at 1456 ("[F]ederal and state statutes substantially limit the right of the owner to exclude members of the public on an invidious basis like race . . . [This limitation] cannot usefully be described as a minimal interference with the property rights of the owner.").

121. *Bowlin v. Lyon*, 67 Iowa 536, 540 (1885)

122. *Id.*

As the Sixth Circuit explained in *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990), in order to *make* the retail contract the statute protects, a customer must first be able to *enter* a store.¹²³ "Were it otherwise, commercial establishments could avoid liability merely by refusing minorities entrance to the establishment" ¹²⁴ Today's statute, in effect, grants customers a privilege to enter, eliminates retailers' right to exclude, and creates a defense to retailers' claims of trespass.¹²⁵

The change in courts' interpretation of § 1981 from *Bowlin* in 1885 to *Watson* in 1990 was not inevitable. Indeed, courts had at least two colorable arguments for continuing to uphold retailers' claimed right to exclude in the face of § 1981 challenges. First, they could have decided that, despite § 1981's property law implications, the statute simply is not a public accommodations law mandating equal access for all. Here, they could rely on the fact that in 1875, a mere five years after § 1981 was reenacted pursuant to the Fourteenth Amendment, Congress passed a separate federal public accommodations law. Congress therefore could not have meant § 1981 to be interpreted as a public accommodations statute, for the 1875 law would then have been duplicative.¹²⁶

Second, Congress in 1964 specifically refused to include retail stores in the coverage of Title II, the public accommodations portion of the Civil Rights Act of 1964. In an early version of what eventually became the Civil Rights Act of 1964, Title II covered "every form of business" and excluded only "rooming houses with five units or less."¹²⁷ However, in response to concerns that such a broad public accommodations provision would spark resistance by Southern members of Congress¹²⁸ and doom the bill, Title II was amended to exclude retail stores and personal service firms, such as

123. *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990). Though *Watson* was decided prior to the Civil Rights Act of 1991, because the plaintiffs were asked to leave, it represents a "core" § 1981 case that was likely to be successful both before and after the broadening of the statute in 1991.

124. *Id.* at 243; see also Singer, *supra* note 9, at 1434 ("Refusal to allow a customer to enter the store is equivalent to a refusal to contract; it is a discriminatory refusal to deal. The license to enter the store is necessary to make good on the store's implicit invitation to deal.").

125. See Hohfeld, *supra* note 97, at 30 (explaining the "jural opposites" of rights, no-rights, privileges, and duties).

126. Singer, *supra* note 9, at 1427.

127. CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 35 (1985).

128. In particular see statements by Judge Smith of Virginia, "Referring to the fact that a chiropractor whose office was in a hotel would be covered by Title II, he made a shrill outburst. 'If I were cutting corns,' he cried, 'I would want to know whose feet I would have to be monkeying around with. I would want to know whether they smelled good or bad.'" *Id.* at 110.

barbershops.¹²⁹

Today's courts could have refused to use § 1981 to make an end-run around Congress' specific withholding of public accommodations protection to retail stores in 1964.¹³⁰ Yet despite the existence of these options for different interpretation, today's courts interpret § 1981 in retail store contexts as requiring retailers to allow customers to enter. Though this application of the statute destroys "the most central right associated with property,"¹³¹ courts nevertheless repeatedly uphold the claims of plaintiffs who assert core § 1981 claims of retailers' outright refusals to deal.

Courts' interpretations of § 1981 make similar inroads on basic notions of freedom of contract. As summarized by Singer, legal thinkers during the classical era conceived of the freedom of contract as encompassing not only the freedom to make contracts, but also the freedom from forced contracting.¹³² Singer identifies this principle as the root of such doctrines as fraud, duress, and incapacity, all examples of situations in which a contracting party's entry into a contract is not of his or her free will.¹³³ This ban on forced contracts also applied to those contracts forced by statute: "Ultimately, the courts interpreted the constitutional protection of liberty and property to prohibit regulation of market relations by the legislature as well."¹³⁴ An additional component of the classical

129. *Id.* at 47, 58.

130. Some commentators, such as Professor William Eskridge, argue that reading a later statute back onto an earlier statute to fill the gaps in the earlier statute is in fact an appropriate method of statutory interpretation. William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479, 1504 (1987) ("Federal judges interpreting the Constitution typically consider not only the constitutional text and its historical background, but also its subsequent interpretational history, related constitutional developments, and current societal facts . . . In other countries, the civil law codes typically instruct judges to interpret unclear statutes and fill in statutory lacunae by looking to analogous statutory rules, general principles of the state's legal order, and the justice or equity of the case."). In addition, as a general matter, the chance that § 1981 might be interpreted to fill a gap in Title II of the Civil Rights Act of 1964 does not doom that interpretation of § 1981. See Evan William Glover, *Legitimacy of Independent Contractor Suits for Hostile Work Environment Under Section 1981*, 52 ALA. L. REV. 1301, 1304 n.27 (2001) ("The legislature also clarified its intent with regard to statutory interpretation. Congress instructed that as a general rule of construction, one federal civil rights law should not be interpreted to narrow the scope of protection of another; thus, section 1981's remedies are independent of other laws.")

131. Singer, *supra* note 9, at 1456.

132. *Id.* at 1347 ("On the contract side, the courts and scholars began the process of developing the ideology of freedom of contract based on the assumption that the terms of contractual relationships would be left to the free will of the parties rather than dictated by the state.").

133. Joseph William Singer, *Review Essay: Legal Realism Now*, 76 CAL. L. REV. 467, 479 (1988).

134. *Id.*

approach to contracts was a prohibition on the state's "regulat[ion] of the substantive terms of private relations."¹³⁵ Thus, to legal theorists in the classical era, all decisions regarding contracts—whether to make them and what content they should have—were assigned to the individual contracting parties and were required to be free from both private and public coercion.

Seen in this light, even today's courts' narrow application of § 1981 to core claims of retail store discrimination is contrary to classical notions of freedom of contract. Retailers are forced to deal with all shoppers, regardless of whether they would otherwise choose to make such contracts. As with the property law dimensions of § 1981, this interpretation of § 1981 is radical, but not inevitable. Singer relates that § 1981's language on the right to contract might have been interpreted as requiring only the enforcement of contracts made between willing parties. In this view, customers would not be able to force retailers to sell to them, but would be able to enforce a contract in court once made.¹³⁶ This is not the approach taken by courts in current § 1981 retail store cases. As illustrated by the Fifth Circuit's opinion in *Causey v. Sewell Cadillac-Chevrolet*, 394 F.3d 285 (5th Cir. 2004), courts read as a core § 1981 violation a retailer's refusal "to engage in business with a consumer attempting to contract with the merchant."¹³⁷ Section 1981 therefore trumps retailers' objections to forced contracting, and requires unwilling parties to transact with one another.

Given the history of property and contract law, courts' willingness to overcome retailers' right to exclude and freedom of contract in their applications of § 1981 to discrimination in retail stores seems quite radical. It is hard to understand why, having taken such steps, courts would then narrow the statute to exclude claims of discrimination by browsers or customers discriminated against either before or after their purchase. The exclusion of these claims is curious on several dimensions.

First, if a greater power—or prohibition—generally also includes the lesser, it would appear that, once granted the greater right to enter a store, a customer would also possess the lesser right to consider the merchandise without discrimination.¹³⁸ Seen from the other direction, once granted the greater power to force a retailer to contract, a customer could also claim the lesser power to shop before or exit after purchasing free of discriminatory harassment.

135. *Id.*

136. Singer, *supra* note 9, at 1427.

137. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 289 (5th Cir. 2004)

138. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 717 (1981) ("The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.").

Second, it seems unlikely that Congress actually contemplated a § 1981 regime that would force retailers to allow customers into their stores and block retailers from ejecting them, but then make customers sitting ducks for discrimination at any point except purchase. Could § 1981 really reflect *both* Congress' reluctance to legislate the "private" interactions of customers and retailers between entry and purchase *and* Congress' complete disregard for retailers' right to exclude and freedom of contract? Though such a reading of the statute seems implausible, today's courts apply § 1981 in just this way.

Third, courts' alarm at the idea of expanding § 1981's coverage into "all contexts," though perhaps reasonable, seems misplaced.¹³⁹ As an initial matter, it is unclear why courts have adopted the idea that additional protection of retail customers under § 1981 will pave the way to § 1981 regulation of truly private interactions at dinner parties or in book clubs, for example. Retail store plaintiffs are not arguing for coverage in "all contexts," but rather for coverage in all phases of their contractual relationship *with a retail store*.¹⁴⁰ Yet even if courts were only alarmed by expanded coverage of browsers and customers before and after their purchases, their alarm would still be misplaced. Seen in light of property and contract law, the proper time for alarm was 1866, when Congress first passed the "absolutely revolutionary" § 1981.¹⁴¹ It is bordering on the absurd that courts continue to express alarm at interpreting § 1981 broadly, given that even the most "conservative" application of the statute to "core" cases, which courts do willingly, requires radical property and contract law decisions.

Once courts recognize that their current, "narrow" applications of § 1981 in fact impose quite heavy burdens on retailers at the point of entry and the point of purchase, their arbitrary limitations on the statute's coverage appear unjustifiable. Courts should recognize § 1981 as the radical statute that Senator Trumbull and his colleagues knew they were passing in 1866. They should cease arbitrarily creating a no-man's-land between the point of entry and the point of sale in which acts of discrimination are permitted and protected.

139. *Lewis v. J.C. Penney Company, Inc.*, 948 F. Supp. 367, 372-73 (D. Del. 1996).

140. The First Circuit makes this distinction in *Garrett v. Tandy Corp.*, 295 F.3d 94, 101 (1st Cir. 2002) observing that § 1981 clearly would not apply "if a store manager makes a racially insensitive comment to a fireman who responds to a false alarm").

141. *Sullivan*, *supra* note 12, at 547 n.38.

IV. Directions for an Improved § 1981 Jurisprudence

A. Model § 1981 Retail Store Cases: Statutory Interpretation, Duration, and Content

Though most courts have interpreted § 1981 since the 1991 amendments very narrowly, and have based their decisions on a constricted view of the underlying retail contract, some courts and commentators have adopted broader analyses. These expansive interpretations of the post-1991 statute should serve as models for future courts' § 1981 retail store decisions. These courts have also analyzed the contractual relationship between customer and retailer, and have taken a view of the contract's duration and content that is more nuanced and loyal to contract law than most § 1981 retail store opinions.

First, *Garrett v. Tandy Corp.* shows courts the appropriate way of interpreting the scope of the post-1991 statute.¹⁴² In *Garrett*, the First Circuit characterized the 1991 amendments as having expanded the statute's reach to "situations beyond the four corners of a particular contract."¹⁴³ The court also explained the history of § 1981, noting that, in response to *Patterson*, "Congress widened the interpretive lens when it enacted the Civil Rights Act of 1991."¹⁴⁴ Though the court ultimately decided against the plaintiffs on contract law grounds, the First Circuit's description of the broadened post-1991 statute serves as a model. As in *Garrett*, courts should consider § 1981's requirement of equality not only in a contract's creation and enforcement, but also in its entire performance, modification, termination, privileges, benefits, terms, and conditions.

Second, courts would benefit from engaging with the law of contracts, as the *Garrett* court did. However, courts should be wary of adopting wholesale the First Circuit's contract law analysis, for it veers dangerously close to the discredited *Patterson* practice of denying the statute's coverage to claims of post-purchase discrimination. Courts should instead follow Professor Burton's and Justice Stevens' approach, viewing the entire interaction between a retailer and those who enter a store as part of a single contractual relationship.

In *Leach v. Heyman*, 233 F. Supp. 2d 906, 911 (D. Ohio 2002), the

142. *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002).

143. *Id.* at 100.

144. *Id.* at 98 (emphasis added).

court began to develop a Burton-like view of a retail contract's duration. The court analyzed the entire "course of [the] dealing" between a store clerk and a customer, reading the earlier transaction between clerk and customer in light of the clerk's later harassment. On this basis, the court concluded that the "service" the clerk had provided was necessarily "less than that which she might have provided, had plaintiff been Caucasian."¹⁴⁵ The court stated:

I am persuaded that a jury could find that [the clerk's] conduct throughout the course of her dealing with plaintiff was indicative of racial animus, even though that motivation may have overtly manifested itself only when [she] came after plaintiff as he was leaving the store. Though she only called plaintiff a name that any African-American would find deeply offensive after he had completed his purchases and was about to exit, that she did so at all is clear and direct proof of bias. It also indicates that the "service" she provided was less than that which she might have provided, had plaintiff been Caucasian.¹⁴⁶

In this view, just as discrimination while shopping implicates any eventual purchase, discrimination after purchase alters a customer's shopping experience in a way that other customers' experiences are not altered. Browsers' rights are similarly protected as part of the ongoing contractual interaction between a retailer and those who enter his or her store. Thus, courts should adopt the suggestions of Professor Burton and Justice Stevens, follow the example of *Leach*, and begin to view retail contracts as ongoing relationships, rather than a collection of discrete, disaggregated moments.

Third, in determining the content of retail contracts, courts should look to *Allen v. U.S. Bancorp*, 264 F. Supp. 2d 945 (D. Or. 2003), as well as courts' analyses of § 1981 restaurant cases such as *Charity v. Denny's Inc.*, No. 98-0554, 1999 U.S. Dist. LEXIS 11462 (D. La. July 27, 1999), *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043 (D. Ill. 1998), and *Perry v. Burger King Corp.*, 924 F. Supp. 548 (S.D.N.Y. 1996). These courts have properly seen services, in addition to the goods or food purchased, as integral parts of retail and restaurant contracts. It is nearly impossible for a customer to make a purchase without interacting in some way with store personnel. It is hard, then, to justify courts' interpretation of § 1981 as permitting store staff to provide shoddy service because of a customer's race or national origin, as long as they ultimately transact with that customer. Courts should combine their

145. *Leach v. Heyman*, 233 F. Supp. 2d 906, 911 (D. Ohio 2002).

146. *Id.*

broadened view of the statute with a broadened view of the contract upon which the statute is built, and recognize services as well as goods as part of the retail bargain.

B. Other Avenues for Relief

As outlined in the introduction, though Title II of the Civil Rights Act of 1964 does not protect against discrimination in retail stores, some state and local public accommodations laws do include retail stores in their coverage. For plaintiffs in those jurisdictions, state or local law provides an additional avenue for relief. However, because not all state and local laws provide such protection, and because many § 1981 contracts-based claims fail, plaintiffs have turned elsewhere in search of legal redress.

1. Section 1981 Full and Equal Benefits Clause

In addition to bringing claims under the portion of § 1981 concerned with contracts, many plaintiffs who have been discriminated against on the basis of race or national origin in retail stores have also brought claims under § 1981's other major clause. This portion of the statute, known as the full and equal benefits clause, states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to *the full and equal benefit* of all laws and proceedings *for the security of persons and property* as is enjoyed by white citizens.¹⁴⁷

At first glance, this clause seems to provide another avenue for relief for plaintiffs in retail store cases, allowing them to make claims for deprivations of their liberty by store security guards or seizure of allegedly stolen goods, for example. However, the circuits are split over whether the full and equal benefits clause protects against discrimination by private actors. In *Chapman v. Higbee Co.*, 319 F.3d 825 (6th Cir. 2003), the Sixth Circuit held *en banc* that an African-American plaintiff could state a § 1981 full and equal benefits claim against a private security officer and store manager who had accused her of shoplifting and searched her person and her belongings.¹⁴⁸ The court focused on the text of § 1981's subsection

147. 42 U.S.C. § 1981 (emphasis added).

148. *Chapman v. Higbee Co.*, 319 F.3d 825, 828-30 (6th Cir. 2003) (*en banc*).

(c), which was added by Congress as part of the Civil Rights Act of 1991 and states, "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."¹⁴⁹ According to the Sixth Circuit, the language of this subsection permits only one interpretation of the statute: that "section 1981 plainly protects against impairment of its equal benefit clause by private discrimination."¹⁵⁰

Other circuits have adopted a similar interpretation of the statute, though not specifically in retail store cases. In *Phillip v. University of Rochester*, 316 F.3d 291 (2d Cir. 2003), the Second Circuit held that a plaintiff might succeed on a full and equal benefits claim against a private actor "without making a traditional state action showing."¹⁵¹ Likewise, the Fifth Circuit, even before the 1991 addition of § 1981's subsection (c), allowed a claim of discrimination under the full and equal benefits clause against private citizens.¹⁵² Finally, though the Tenth Circuit has not spoken on the issue, a Kansas district court has adopted this same approach, refusing to read a state action requirement into § 1981's full and equal benefits clause.¹⁵³

The Eighth Circuit, however, has come to the opposite conclusion, holding that plaintiffs must make a showing of state action in order to bring a § 1981 full and equal benefits claim. In *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), the plaintiff brought suit under both clauses of § 1981. The Eighth Circuit allowed the contract-based claim to proceed, but upheld dismissal of the plaintiff's full and equal benefits claim, reasoning that, "[b]ecause the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law."¹⁵⁴ The Third, Fourth, and D.C. Circuits have followed suit, stating in dictum that full and equal benefit claims against private actors would fail.¹⁵⁵ In two district court opinions that specifically address race discrimination in retail stores, courts have also required state

149. 42 U.S.C. § 1981(c)

150. *Chapman*, 319 F.3d at 833.

151. *Phillip v. University of Rochester*, 316 F.3d 291, 292 (2d Cir. 2003)

152. *Jennings v. Patterson*, 488 F.2d 436, 441-42 (5th Cir. 1974).

153. *Hester v. Wal-Mart Stores, Inc.*, 356 F. Supp. 2d 1195, 1198 (D. Kan. 2005) ("This court believes that the Tenth Circuit would hold that state action is not required to state a 'full and equal benefit' claim under section 1981.").

154. *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001)

155. See *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 799 (3d Cir. 2001). See also *Jones v. Poindexter*, 903 F.2d 1006, 1010 (4th Cir. 1990); *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 30 n.1 (D.D.C. 1999) ("Most courts have held that 'the equal benefits' clause does not extend to private discrimination, and thus, requires state action.").

action for a successful § 1981 full and equal benefits clause claim.¹⁵⁶

In June 2004, the Supreme Court denied certiorari in the Sixth Circuit's *Chapman v. Higbee*, 542 U.S. 945 (2004), leaving this issue unresolved.¹⁵⁷ At present, the Sixth, Second, Fifth, and perhaps Tenth Circuits have held that the full and equal benefit clause of § 1981 might provide an additional opportunity for legal redress for plaintiffs who have been discriminated against in retail stores.¹⁵⁸

2. Section 1982 Right to Purchase Personal Property

A potential second avenue for relief for victims of retailers' discrimination might be 42 U.S.C. § 1982, which guarantees to "all citizens of the United States" the "same right . . . as is enjoyed by white citizens" to "inherit, purchase, lease, sell, hold, and convey real and personal property." However, as Professor Kennedy observes, "[s]ection 1982 can be applied to lost contractual rights, but it is applied no more broadly than Section 1981."¹⁵⁹ Indeed, the plaintiffs who have brought both § 1981 and § 1982 claims have found their claims succeeding or failing together. In *Shen v. A&P Food Stores*, No. 93 CV 1184, 1995 U.S. Dist. LEXIS 21404 (E.D.N.Y. Dec. 7, 1995), the court held that a grocery store's refusal to serve the plaintiffs violated both § 1981 and § 1982. "[B]ecause of the related origins and language of the two sections, they are generally construed *in pari materia*. [G]roceries constitute personal property and the refusal to sell groceries is a denial of the right to enter into a contract."¹⁶⁰ Likewise, in *Morris v. Office Max, Inc.*, the court dismissed both the plaintiff's § 1981 and § 1982 claims, stating that, "[b]ecause of their common origin and purpose, § 1981 and § 1982 are generally construed in tandem."¹⁶¹

156. *Lewis v. J.C. Penney Company, Inc.*, 948 F. Supp. 367, 371 (D. Del. 1996) ("private defendants, as opposed to state actors, cannot deprive individuals of the full and equal benefit of all laws"); *Sterling v. Kazmierczak*, 983 F. Supp. 1186, 1192 (N.D. Ill. 1997) ("However, the parties did not cite and the court could not find any Seventh Circuit decisions which hold that the equal benefits clause creates a federal remedy for state law tort claims where racial animus is alleged. Nor does the court believe that Congress intended such a remedy.").

157. *Chapman v. Higbee*, 542 U.S. 945 (2004) (denying cert.).

158. For further analysis of § 1981's full and equal benefits clause, see Simone P. Wilson, *Retailing Racial Profiling: A Case for the Use of the Full and Equal Benefits Clause of Section 1981 in Consumer Racism Claims*, 6 RUTGERS RACE & L. REV. 123 (2004).

159. Kennedy, *supra* note 11, at 334.

160. *Shen v. A&P Food Stores*, No. 93 CV 1184, 1995 U.S. Dist. LEXIS 21404, at *6 (E.D.N.Y. Dec. 7, 1995).

161. *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); see also *Garrett v. Tandy Corp.*, 295 F.3d 94, 103 (1st Cir. 2002) ("[W]e are confident that our reasoning vis-

However, in one case of retail store discrimination, a court has analyzed claims under the two statutes separately. In *Leach v. Hyman*, the plaintiff won his § 1981 contracts clause claim but lost his § 1982 claim.¹⁶² The court concluded:

[The plaintiff] cannot make out a claim under § 1982, because he was, regardless of Heyman's racial animus, able to purchase the items that he had selected. Nothing that he wanted to buy was withheld from him, or only made available to him on terms and conditions that differed from the terms and conditions pursuant to which it was available to others.¹⁶³

Interestingly, the *Leach* court adopted an unusually broad view of the protections of § 1981's contracts clause. In allowing relief under that statute, however, the court pulled back on § 1982, and refused to extend that statute's coverage to the limits of the coverage provided by § 1981.

Thus, § 1982 fails to provide an additional viable option for plaintiffs who have been discriminated against by retailers, as most courts interpret § 1982 coextensively with § 1981 in retail store cases. Commentators have suggested few remaining strategies for such plaintiffs, among them common law claims, plans for law reform, and tactics for consumer empowerment.

3. Common Law Claims, Law Reform, and Consumer Empowerment

To plug the holes created by the failure of many § 1981 and § 1982 claims and the scanty coverage of retail stores under state and local public accommodations laws, Professors Harris and Kennedy have suggested that plaintiffs bring common law tort claims against retailers who discriminate. Harris argues that a retailer's detention of a shopper "on suspicion of shoplifting" gives rise to claims for false imprisonment and perhaps assault and battery.¹⁶⁴ She notes, however, that these claims are often doomed by laws that permit retailers, in the name of "protect[ing] their goods," to stop and search "'in a reasonable manner shoppers reasonably suspected of shoplifting.'"¹⁶⁵ Kennedy adds to the list of available common law

à-vis section 1981 (and, thus, our holding) applies with equal force to any claim that the appellant might have under section 1982."); *Hill v. Shell Oil Co.*, 78 F. Supp. 764, 777 (N.D. Ill. 1999) ("Courts construe § 1982 as coextensive with § 1981.").

162. *Leach v. Heyman*, 233 F. Supp. 2d 906, 911 (D. Ohio 2002).

163. *Id.*

164. Harris, *supra* note 6, at 18.

165. *Id.* at 17-18.

claims defamation, negligent training and supervision, and negligence.¹⁶⁶ Yet she also notes problems with plaintiffs' relying solely on common law tort claims, observing that "[b]y suppressing or marginalizing the racial aspect of the claims, reliance on state law claims perpetuates the belief that profiling customers is an appropriate means of protecting a business."¹⁶⁷

Given the hurdles that plaintiffs face in attempting to use § 1981, § 1982, and the common law to obtain a remedy for retailers' discrimination, it is not surprising that commentators have advanced proposals for law reform. Building on an argument by Professor Neil Williams, Harris suggests that courts interpret the common law requirement of good faith and fair dealing in contracts as prohibiting discrimination on the basis of race.¹⁶⁸ Harris points out a flaw in this proposal, however, noting that "customers who were merely browsing in the store could arguably be characterized as not yet engaged in the formation, performance, enforcement, or termination of a contract."¹⁶⁹ Indeed, the texts of § 205 of the Second Restatement of Contracts and §1-203 of the Uniform Commercial Code concerning the duty of good faith and fair dealing both refer only to the "performance" and "enforcement" of contracts. If courts interpreting this common law requirement adopt a narrow view of the duration and content of retail contracts that is similar to the view adopted by most courts in § 1981 contracts clause cases, the reach of this proposed common law solution would be quite limited.¹⁷⁰ In addition, it is possible that retailers might discriminate on the basis of race or national origin in good faith. Such discrimination might be a response by a non-racist retailer to the racist beliefs of his or her customers or co-workers. A plaintiff who is discriminated against might therefore lose if he or she only relies on the common law

166. Kennedy, *supra* note 11, at 337-38.

167. *Id.*

168. Harris, *supra* note 6, at 18-19 ("Professor Neil Williams highlights two federal opinions from Maine that strongly suggest that race discrimination is inconsistent with the common law contractual requirements of good faith and fair dealing. Professor Williams contends that the survival of racial discrimination in contract law advances the belief that private discrimination is morally acceptable. He advocates changes in contract law that would 'reflect contemporary society's disdain for racial discrimination' by prohibiting discrimination in the formation, performance, enforcement, or termination of a contract.").

169. *Id.* at 18-19.

170. Though he does not develop this argument at length, Professor Charles Fried seems to view the requirement of good faith and fair dealing as attaching even before the contract is formed. "Good faith is a way of dealing with a contractual party: honestly, decently. It is an adverbial notion suggesting the avoidance of chicanery and sharp practice (bad faith) whether *in coming to an agreement* or in carrying out its terms." CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 74 (1981).

requirement of good faith and fair dealing.¹⁷¹

Professor Singer proposes a second way that the common law of property might be altered to address the problem of discrimination by retailers. Singer suggests that, under the common law, once owners of private property convert their property into a place of public accommodation, they lose their right to exclude. He explains:

[T]he common-law rule allowing arbitrary exclusion of customers is based on an illegitimate conception of private property, which supposes that businesses open to the public are indistinguishable from private homes. On the contrary, by opening one's property to the public for business purposes, the owner waives a part of her right to exclude, since she no longer can claim any legitimate privacy interests.¹⁷²

This change in the common law – the clear grant of the right to enter retail stores to all shoppers and the elimination of retailers' right to exclude – would contribute to the elimination of discrimination within retail stores by making clear that retail stores are not in any sense "private." By removing this baseline assumption within the common law,¹⁷³ retailers could no longer justify discrimination on their premises by reference to their status as owners of private property.

A third law reform proposal comes from Amanda G. Main, who advocates that Title II of the Civil Rights Act of 1964 be read to include retail stores in its coverage.¹⁷⁴ Main argues first that the statute's list of covered entities should be read as illustrative, rather than exhaustive. She maintains that "[t]here is no appreciable distinction between retail stores and other listed places of public accommodation" because retail stores are as open to the public and linked to interstate commerce as the listed entities.¹⁷⁵ Echoing Professor Eskridge's idea of dynamic statutory interpretation,¹⁷⁶ Main also proposes that Title II be read in light of later public accommodations statutes. She points in particular to the Americans

171. Claims under the equitable doctrines of reliance and unjust enrichment might also be available to plaintiffs who are discriminated against in retail stores. However, because an analysis of such claims would turn on the individual factual circumstances of each case, it is omitted from this article.

172. Singer, *supra* note 9, at 1448.

173. This is the assumption, based on an idea of retailers' right to exclude, that courts' radical application of § 1981 to "core" retail stores already eliminates, as explained in Part III.C, *supra*.

174. Main, *supra* note 11.

175. *Id.* at 313.

176. See Eskridge, *supra* note 130.

with Disabilities Act ("ADA"), which includes retail stores in its coverage. "In light of Congress' acceptance of a broad list of places of public accommodation in the ADA, it is reasonable that Congress would be receptive to a similar list of accommodations in Title II."¹⁷⁷ This change in Title II would extend the federal prohibition on race discrimination in places of public accommodation to retail stores, and therefore also to those plaintiffs denied protection under § 1981 and other laws.

Professor Regina Austin suggests a final, extra-legal way of addressing the problem of discrimination on the basis of race or national origin in retail stores.¹⁷⁸ Austin argues that African Americans should supplement, and perhaps replace, their legal challenges to retailers' discriminatory practices by "[g]enerating collective pro-production, pro-distribution sentiments among blacks. . . ."¹⁷⁹ She advocates that African-American shoppers explore "alternative economic arrangements" and "[build] on the legacy of a black tradition of mutual aid and communal selfhelp."¹⁸⁰ She offers as an example successful "shopping areas, housing projects, and credit unions" owned and run by African-American churches.¹⁸¹

Austin also issues a challenge, urging African Americans to "embrace the idea that economic resistance is something every black can engage in every day. Blacks must take on the mantle of outlaws or bandits, for example, when it comes to passing dollars from one black hand to the next as many times as possible before the dollars fall back into the grasp of someone else."¹⁸² Here, Professor Austin echoes the now-famous response of Patricia Williams, an African-American law professor, to a white store clerk's refusal to let her enter a clothing store:

I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me. . . . In this weird ontological imbalance, I realized that buying something in that store was like bestowing a gift: the gift of my commerce. . . . I was quite willing to disenfranchise myself in the heat of my need to revoke the flattery of my purchasing power. I was willing to boycott this particular store, random white-owned businesses, and anyone who blew

177. Main, *supra* note 11, at 313-14.

178. Regina Austin, "A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America, 1994 UTAH L. REV. 147 (1994).

179. *Id.* at 173.

180. *Id.* at 174.

181. *Id.*

182. *Id.* at 176.

bubble gum in my face again.¹⁸³

To Professor Austin, and perhaps also Professor Williams, the law's options for redress for victims of discrimination in retail stores are shamefully insufficient, and shoppers like Professor Williams, along with Samaad Bishop and the McCrea family described in the Introduction, are left with only the options of boycott and self-help.

Conclusion

This article argues that the "right to contract" protected by § 1981 is a process rather than a moment. The statute protects the entire contractual relationship between customer and a store: entering, browsing or sampling the goods available, interacting with store personnel, completing a purchase, and finally exiting the store. It also argues that stores provide services as well as goods, and § 1981 demands that those services be provided equally to all customers, regardless of their race or national origin. Finally, it argues that § 1981 cannot be interpreted both to mandate equal access and to permit unequal treatment at all points except the checkout counter. Congress attempted to broaden § 1981 in 1991 to correct this very mistake in logic, but today's courts have continued to interpret the statute narrowly and improperly.

Some might respond to the critiques offered in this article, and to the alternative proposals raised by commentators, by arguing that the status quo is appropriate, and that the market, unaided by judicial intervention, will remedy the problem of race discrimination by retailers. Professor Richard Epstein takes this position in his attacks on the public accommodations section of the Civil Rights Act of 1964.¹⁸⁴ Epstein asks, if the prohibition on discrimination in places of public accommodation were repealed, "[i]s there anyone who thinks that even one major corporation would adopt a policy of exclusion on the grounds of race or sex? Or if it did, that it could profit by that strategy in the marketplace?"¹⁸⁵ Epstein's questions depend on two related assumptions: that the power of withheld consumer dollars would force discriminatory retailers out of business, and that non-discriminating retailers in fact exist as alternatives for African-American, Latino, and Asian-American

183. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128 (1987).

184. Richard Epstein, *Standing Firm, on Forbidden Ground*, 31 SAN DIEGO L. REV. 1 (1994).

185. *Id.* at 28.

shoppers.

Research summarized by Professor Harris contradicts these assumptions by revealing the extensive and pervasive nature of race discrimination in today's market. Harris cites Gallup poll results in which thirty percent of African-American respondents reported that they had experienced discrimination while shopping during the last thirty days, and twenty-one percent had been discriminated against while dining out.¹⁸⁶ In another study by economist Peter Siegelman, survey evidence places "the probability of discrimination [against African-American customers] in any given restaurant visit or shopping trip [at] roughly one to five percent."¹⁸⁷ Likewise, a study of the retail industry by Professors Carol M. Motley of Howard University and Thomas L. Ainscough of the University of Wisconsin-Whitewater found that "African Americans wait longer for customer service than whites of the same gender."¹⁸⁸ Though surveys and studies are certainly open to criticism, these results at minimum reveal that race discrimination in retail stores is present and pervasive, and that Epstein's vision of a market fix is unrealistic and flawed.

The continued existence of race and national origin discrimination by retailers and the dearth of options for legal redress point to the need for courts to correct their flawed § 1981 contracts clause jurisprudence. Courts must cease ignoring the 1991 amendments to the statute, and interpret it broadly, consistent with canons of statutory interpretation and Congress' goals. They must correctly analyze a retail contract's duration, adopting a view of a right to contract that is exercised over the course of the entire relationship between a customer and a retailer. They must also consider service as well as goods as part of the bargain between a customer and a retailer. Each of these changes would bring the claims of browsers, those customers discriminated against before purchasing, and those customers discriminated against after purchasing within the ambit of the statute.

If judges continue to apply § 1981 narrowly, and to build their § 1981 analyses on a correspondingly narrow vision of a retail contract's duration and content, they will continue to permit race and national origin discrimination by retailers. Judges will allow clear-cut race and national origin discrimination to exist in some protected zone that they deem outside the contractual relationship and beyond the statute's coverage. "Whites only" signs at stores' entrances are relegated to our country's past. It is wrong for judges

186. Harris, *supra* note 6, at 6.

187. *Id.*

188. *Id.* at 7.

today to adopt an interpretation of § 1981 that protects the exercise of similar discrimination, but within a store's doors. In effect, these judges are allowing retailers to implement their own "whites only" policies, providing to white customers only a harassment-free and discrimination-free shopping experience. In the words of Justice Brennan, "[o]ne wonders whether [such a judge] still believes that race discrimination—or, more accurately, race discrimination against non-whites—is still a problem in our society, or even remembers that it ever was."¹⁸⁹

189. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (1989) (Brennan, J., dissenting).

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